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No. 93-114

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

LEGACY, LTD.,

Petitioner,

v.

CHANNEL HOME CENTERS, INC., CHANNEL HOME CENTERS REALTY CORPORATION and CHANNEL ACQUISITION COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 365(d)(4) of the Bankruptcy Code permits the Bankruptcy Court, only within the first 60 days after the order for relief, to grant any extension for the affirmance or rejection of a lease of nonresidential real property.

2. Whether a federal appellate court may refuse to apply the unambiguous statutory language of 11 U.S.C. § 365(d)(4), particularly where the federal appellate court finds in its opinion that: (i) there is no legislative history that speaks to the question presented; (ii) there is no information on the question presented in the bankruptcy law as it existed before § 365(d)(4) was enacted in 1984; (iii) there is no other provision of the Bankruptcy Code which assists in interpretation of the question presented; and (iv) the language of § 365(d)(4) was framed and adopted without Congress considering in its deliberations the question presented.

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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

LEGACY, LTD.,

Petitioner,

v.

CHANNEL HOME CENTERS, INC., CHANNEL HOME CENTERS REALTY CORPORATION and CHANNEL ACQUISITION COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Legacy, Ltd. ("Legacy"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 30, 1993. A timely motion for rehearing en banc was denied on April 27, 1993, with one judge noting his disagreement.

OPINIONS BELOW

The judgment order of the Court of Appeals, with the opinion, a dissenting opinion by Judge Hutchinson, and the denial of motion for rehearing are reported and appear at 989 F.2d 682 (3d Cir. 1993) and appear at the Appendix at App. 1. (Citations to the Appendix are made thus: "App. ____.") The order and opinion of the District Court of the District of New Jersey are unreported and appear in the

Appendix at App. 28. The order of the Bankruptcy Court is oral and the related portions of the transcript appear in the Appendix at App. 62.

JURISDICTION

The judgment order of the Court of Appeals for the Third Circuit was entered on March 30, 1993, and a timely petition for rehearing en banc was denied on April 27, 1993, Judge Hutchinson voting to require an answer. This Petition for Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute involved is United States Bankruptcy Code 11 U.S.C. § 365(d)(4) and reads as follows:

> (4) Notwithstanding paragraphs(1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

STATEMENT OF THE CASE

Section 365(d)(4) of the Bankruptcy Code permits the Bankruptcy Court, under specified circumstances, to grant an extension of time to a debtor under Chapter 11 of the Bankruptcy Code for the affirmance or rejection of a lease of nonresidential real property. Legacy is a landlord of nonresidential real property with debtor, Channel Home Centers, Inc. ("Channel"), as the tenant. This case arises from the fact that the Bankruptcy Court entered two orders under § 365(d)(4) with each granting an extension of the

time for Channel to assume or reject Legacy's lease – the first extension was granted within the first 60 days after the order for relief, but the second, although granted within the first extension period, was granted after the 60-day period prescribed by § 365(d)(4) had expired.

First Question Presented: Whether 11 U.S.C. § 365(d)(4) of the Bankruptcy Code permits the Bankruptcy Court, only within the first 60 days after the order for relief, to grant any extension for the affirmance or rejection of a lease of nonresidential real property.

Second Question Presented: Whether a federal appellate court may refuse to apply the unambiguous statutory language of 11 U.S.C. § 365(d)(4), particularly where the federal appellate court finds in its opinion that: (i) there is no legislative history that speaks to the question presented; (ii) there is no information on the question presented in the bankruptcy law as it existed before § 365(d)(4) was enacted in 1984; (iii) there is no other provision of the Bankruptcy Code which assists in interpretation of the question presented; and (iv) the language of § 365(d)(4) was framed and adopted without Congress considering in its deliberations the question presented.

REASONS FOR GRANTING THE WRIT

A. The Third Circuit's Decision Creates A Conflict With The Decisions Of The Fifth And Ninth Circuit.

The statute in question, § 365(d)(4) of the Bankruptcy Code, provides simply that "if the trustee does not assume or reject an unexpired lease on nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the Court, for cause, within such 60 day period, fixes, as such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor."

Legacy submits that the plain language of the statute requires that a nonresidential lease must be deemed rejected unless the trustee either (a) assumes or rejects the lease within 60 days after the date of the order for relief or (b) assumes or rejects the lease within any additional period of time that the Bankruptcy Court fixes during the initial 60-day period prescribed by the statute.

The Fifth and Ninth Circuits, in considering the same issue, remarkably determined that the meaning of the words of § 365(d)(4) was ambiguous. *In re Victoria Station, Inc.*, 875 F.2d 1380, 1383 (9th Cir. 1989), and in *In re American Healthcare Management, Inc.*, 900 F.2d 827 (5th Cir. 1990), the circuit courts held that "within such 60 day period" modifies the noun "cause" rather than the verb "fixes."

The Third Circuit "respectfully" but forthrightly disagreed with the interpretation of these other circuit courts. 989 F.2d at 686. The Third Circuit described the interpretation of the Ninth and Fifth Circuits saying that those courts' conclusion that the phrase "within such 60 day period" modifies the noun "cause" rather than the verb "fixes" was an "unnatural, unclear and unnecessary" construction of the English language. Further, the Third Circuit found that under this interpretation, the statute would in effect provide that a covered lease would be deemed to be rejected unless the trustee assumed it within the 60-day period or within such additional time as the court fixes for a cause that existed or arose within such 60-day period. The Third Circuit then found that it seemed to follow that even requests for first extensions would not have to be filed or granted during the 60-day period — provided that they were based on a "cause" that arose during that period. 989 F.2d at 686 n.7.

Thus, although the Third Circuit states that its opinion is consistent with the decisions of the Fifth and Ninth Circuits, there are two different and conflicting practices that are mandated by the two approaches to § 365(d)(4):

1. **Time Within Which An Extension Must Be Requested.**

(i) **Fifth and Ninth Circuits** — The Third Circuit concluded that a "necessary consequence of the Ninth Circuit's parsing of the statutory language is that a first extension request would not have to be filed within the 60 day period." App. 15.

(ii) **Third Circuit** — Under the Third Circuit's approach a first extension request must be filed within the 60-day period.

2. **Time Within Which The "Cause" For An Extension Must Arise.**

(i) **Fifth and Ninth Circuits** — Under the law of the Fifth and Ninth Circuits, the only cause that suffices for an extension granted after the 60th day following the order for relief would be a cause which first arose or existed prior to the 60th day and was found to continue.

(ii) **Third Circuit** — In the Third Circuit a debtor can be granted a second extension based on any cause no matter when it arises. Indeed, in this very case, Legacy contended that the cause relied upon by the Bankruptcy Court in granting the second extension arose after the 60th day and was different from the cause which had been used to obtain the first extension. If the Third Circuit had adopted the law of the Fifth and Ninth Circuits, Legacy would have been entitled to a decision in its favor due to the different causes; but because of the conflict between the reasoning of the circuits, the difference in the causes found by the Bankruptcy Court for the first and second extensions were not part of the Third Circuit's disposition of the case.

This case squarely presents an issue that is practically important to the administration of a vast majority of bankruptcy cases. Since the language of § 365(d)(4) is

identical to that of § 365(d)(1), the issue arises in Chapter 7 cases as well as those in Chapter 11.

B. The Third Circuit's Decision Decides An Important Federal Question In A Way That Patently Violates The Standards Of Statutory Interpretation.

Given the plain language of § 365(d)(4), the Third Circuit correctly found "that a strictly literal parsing of the words of the statute" permits the Bankruptcy Court to grant any extension only within the initial 60-day period. 989 F.2d at 687. But, the Third Circuit proceeded to hold that this literal application of the statute would be "demonstrably at odds with the intentions of its drafters." *Id.*

The panel reached this result by stating that this was one of those "rare cases" in which "even unambiguous statutory language need not be followed" because a literal application produced a result that the panel concluded would be "demonstrably at odds" with the intention of the drafters of the statute. *Id.* This holding by the Third Circuit conflicts with reason and prior holdings of this Court, *inter alia*, because the Third Circuit decision contains the following findings:

> (i) "Although both sides have cited portions of the legislative history, we find nothing in the legislative history that speaks to the question presented here [whether Section 365(d)(4) requires that all extensions must be granted within the 60 day period]." 989 F.2d at 685.
>
> (ii) "Nor do we see any significant help in the bankruptcy law as it existed before Section 365(d)(4) was enacted in 1984. . . ." *Id.*
>
> (iii) "Nor do we see any significant help . . . in any other provisions of the Code." *Id.*
>
> (iv) ". . . we believe that the language of Section 365(d)(4) was framed and adopted without considering the question of second extensions." *Id.* at 688.

The Third Circuit decision invites federal courts to "interpret" statutes that are unambiguous and have no pertinent legislative history by rewriting the plain language of the statute as if they were themselves legislators. The standard of interpretation adopted by the Third Circuit is contrary to the decisions of this Court, and will make the meaning of most statutes a litigable issue, thus increasing the burden upon litigants and upon the courts.

C. The Issue Presented Is Important To The Public And Arises In Many Bankruptcy Situations.

The issue of extensions under § 365(d)(4) is an important federal question affecting virtually every Chapter 11 debtor. By giving the debtor an opportunity for multiple extensions of time, a debtor is allowed to speculate on the market for commercial real estate during the prolonged period of uncertainty about whether the tenant will elect to accept or reject the leasehold. The landlord has no such opportunity. It must simply wait and suffer the uncertainty of the market risk that the debtor avoids while delaying decision. So long as unilateral power to accept or reject a lease remains with the debtor, mutuality of the obligation is absent. Section 365(d)(4) was intended to limit that unilateral power, and to do so the statute says, in effect, to debtors who are lessees of commercial real estate— at the time you seek the protection of the bankruptcy court, decide within 60 days whether you want to continue your commercial leases with both their obligations and their benefits or else persuade the court within that 60-day period how much more time you need.

If extensions must be granted within 60 days of a petition for reorganization, the landlord knows soon after bankruptcy precisely when his uncertainty will end, and the debtor also knows when he must act or affirm or reject. This shared knowledge assists both parties in planning their affairs and limits the possibility that one party, the debtor-tenant, can continue to free itself of market risks as

it continues to monitor market conditions at the other party's expense.

ARGUMENT

I. AN INTOLERABLE CONFLICT AMONG THE CIRCUITS IS PRESENTED.

The Third Circuit's discussion presents a real and practical, not technical, intolerable conflict with the opinions of the Ninth Circuit in *In re Victoria Station, Inc.*, 875 F.2d 1380 (9th Cir. 1989) (adopting some of the reasoning of *In re Southwest Aircraft Servs., Inc.*, 831 F.2d 848 (9th Cir. 1987) *cert. denied*, 487 U.S. 1206 (1988)) and the decision of the Fifth Circuit in *In re American Healthcare Management, Inc.*, 900 F.2d 827 (5th Cir. 1990).

The Third Circuit correctly found that the view of the Fifth and Ninth Circuits was "inconsistent with accepted usage," 989 F.2d at 686. The Third Circuit found that the Fifth and Ninth Circuits' use of the words "cause . . . within such 60 day period" to mean a "cause that exists or arises within the 60 day period" was "unnatural, unclear and unnecessary." *Id.* With respect accorded to the Fifth and Ninth Circuits, their logomachy regarding the words of § 365(d)(4) is ungrammatical and illogical. The Third Circuit had no doubt that if § 365(d)(4) were meant to convey the meaning as deciphered by the other circuits, "that different terms would have been employed." *Id.* at 687.

The Third Circuit stated that it was persuaded that the interpretation of the Fifth and Ninth Circuits was incorrect not only because the grammar was untenable, but also because it "would not serve the evidence purposes of § 365(d)(4) — to prevent trustees from taking too much time in deciding whether to assume unexpired residential leases." *Id.* at 686. The Third Circuit correctly concluded that under the interpretation of the Fifth and Ninth Circuits, the statute would not impose any restriction on the time for seeking or granting an extension based on cause that existed or arose during the 60-day period. The

statute would not prohibit a trustee from waiting until long after the 60-day period expired before seeking even an initial extension based on a cause which arose prior to the 60th day.

While the Third Circuit had no trouble finding how the rationale of the Fifth and Ninth Circuits violated the evident intent of § 365(d)(4), that court failed to see the short coming of its own analysis. Although arrived at in error, at least under the reasoning of the Fifth and Ninth Circuits, the "cause" which must be relied upon for a second extension by a debtor must have arisen before the 60th day after the filing of the petition. Under the rationale of the Third Circuit, the landlord does not know in any period after the bankruptcy precisely when the uncertainty raised by the tenant's extension of the election period will end since there is no way of telling what might arise which the debtor would point to as a new "cause" under § 365(d)(4). The landlord is subjected to the possibility that the tenant can continue to be free of market risks as it monitors market conditions by asserting new and different "causes" at the landlord's expense.

The Third Circuit incorrectly states that it has reached the same result as the Fifth and Ninth Circuits. 989 F.2d at 688. There are differences between these circuits, because of their different approaches to interpreting § 365(d)(4), which are real, practical and intolerable. Indeed, Legacy presented as an alternative argument to the Third Circuit that if the Third Circuit were to adopt the erroneous grammar of the Fifth and Ninth Circuits, even then Legacy was entitled to judgment in its favor. The "cause" relied upon by the Bankruptcy Court to grant the first extension was not the same "cause" which the Bankruptcy Court relied on for the second extension. *See* dissenting opinion 989 F.2d at 691. However, while this difference in "cause" would have been outcome determinative under the rationale of the Fifth and Ninth Circuits, it was irrelevant in the Third Circuit.

The disparate treatment of landlord creditors in the circuits requires explicit attention from this Court. The fact

that all three circuits have in fact failed to enforce the unambiguous language of the statute underscores the need for this Court's decision regarding § 365(d)(4).

II. THE THIRD CIRCUIT'S DECISION DECIDES AN IMPORTANT QUESTION IN A WAY THAT PATENTLY VIOLATES THE STANDARD FOR STATUTORY INTERPRETATION.

The decision of the Third Circuit fails to comply with standards of interpretation prescribed by recent decisions of this Court, particularly with respect to statutes that are determined to be unambiguous. The standard that has evolved in the interpretation of unambiguous statutes is set forth in *Patterson v. Shumate*, 112 S.Ct. 2242 (1992); *Reves v. Ernst & Young*, 113 S.Ct. 1163 (1993) and *Conroy v. Aniskoff*, 113 S.Ct. 1562 (1993), which was decided the day after the Third Circuit opinion was filed. In *Patterson* and *Reves*, it was clearly held that a statute would be enforced according to its plain language in the absence of "clearly expressed legislative intention." 112 S.Ct. at 2248 and 113 S.Ct. at 1169. Moreover, in *Conroy*, the Court indicated that in order to depart from the literal language of a statute the proponent of a different interpretation must show that the literal application is one that Congress would find "absurd or illogical." *Id.* at 1566.

The proof that this is not one of the "rare case" described by this Court for rejecting enforcement of unambiguous legislation can be ascertained from the cases relied upon in the Third Circuit's opinion: *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); *Public Citizen v. United States*, 491 U.S. 440 (1989); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989). Only in *Green* did this Court fail to enforce the statute according to its plain language; in that case the statute was found ambiguous and arguably unconstitutional if enforced literally. In all of the cases cited by the Third Circuit, there was a substantial legislative record from which this Court,

considering the circumstances surrounding the enactment of the statute, could decide whether it was "unreasonable to believe that the legislature intended to include the particular act." *Public Citizen v. United States*, 491 U.S. at 454. In this case, there is no such legislative history. 989 F.2d at 685.

In rejecting the plain language of § 365(d)(4), the Third Circuit speculates that Congress might have used even more explicit language than it did. 989 F.2d at 687. In fact, the statute, which Congress did write, by its very words permits only such extension as may be granted within the initial 60-day period. In rejecting this clear language, the Third Circuit incongruously stated that the statute was "framed and adopted without considering the question of second extensions." 989 F.2d at 688.

In refusing to use the literal meaning of the statute, the majority of the panel rejects the statutory interpretation analysis required by this Court. Under the decisions of this Court, a court cannot assume that because there is no legislative history, Congress has neglected to consider results that follow from enforcement of the statutory language. The Third Circuit's holding leaves legislation dependent upon whether a particular tribunal believes it can find a better method for accomplishing what the tribunal perceives as the legislative purpose. Such an approach to statutory construction is certain to leave litigants and courts in an interpretative thicket. This Court has specifically rejected the test that the Third Circuit applied. In *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991), the issue before the Court was payment of expert witness fees under the fee-shifting provisions of the Civil Rights Act. The Court stated as follows:

> UVUH's last contention is that, even if Congress plainly did not include expert fees in the fee shifting provisions of [the Civil Rights Act], *it would have done so had it thought about it* . . . Thus, the argument runs, the 94th Congress simply forgot; it is our duty to

ask how they would have decided had they actually considered the question.

This argument profoundly mistakes our rule . . .

We thus reject this last argument for the same reason that Justice Brandeis, writing for the Court, once rejected a similar (though less explicit) argument by the United States:

> [The statute's] language is plain and unambiguous. *What the government asks is not a construction of a statute but, in effect, an enlargement of it by the court*, so that what was omitted, presumably by inadvertence, may be included within its scope. *To apply omissions transcends the judicial function*.

491 U.S. at 99-100 (emphasis added).

In *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), the Court dealt with the Resource Conservation and Recovery Act of 1976 (RCRA). After finding that the language of the statute was unambiguous, the Court turned to Petitioners' contention that a literal interpretation of the notice provisions of RCRA would defeat Congress' intent in enacting a statute which encourages citizen suits. The Supreme Court agreed that Congress intended that citizen suits should be encouraged and determined that the petitioners were correct that citizen suits would be more encouraged if notice were not required pursuant to the literal interpretation of RCRA. Even so, the Supreme Court found "nothing in the legislative history of the citizen suit provision militates against honoring the plain language of the notice requirement." *Id.* at 29. The Supreme Court in *Hallstrom* found that the petitioners had not proven that a literal interpretation of the meaning of the statute would compel "absurd or futile results." *Id.*

Before the enactment of Section 365(d)(4), Chapter 11 debtors had no fixed deadlines for assuming or rejecting unexpired leases. 989 F.2d at 685 n.3. Therefore, literal

interpretation of § 365(d)(4) could not be in conflict with legislative intent. Any interpretation, including the literal interpretation of the statute, which fixes any deadline is consistent with an intention by Congress to impose a restriction on the time within which a trustee must decide whether to assume or reject a lease.

Further, there are plausible reasons why Congress would have wanted the plain language of the statute to be given effect. The reasons, well put by the dissenting member of the panel, are:

> (i) To shorten the period for accepting or rejecting a lease; and
>
> (ii) To increase the certainty associated with the process of such acceptance or rejection.

If the statute is enforced according to its plain language, there will always be a date certain by which the lease must be accepted or rejected and both debtor and lessor can plan their affairs accordingly. Under the interpretation reached by a majority of the panel, the debtor is given an indefinite put option with respect to the lease. The Third Circuit's interpretation has little support as a matter of fairness, much less as a matter of interpreting the words of the statute. The Third Circuit transforms § 365(d)(4) from permitting extensions only within the first 60 days to a judicially prolonged gauntlet that must be run by a landlord.

Further, the Third Circuit came to its findings in direct conflict with this Court's holdings because it claimed (incorrectly, see *supra* at 7 and 13) that Legacy had not offered, and the majority of the panel (as compared to the dissenter) could not think of any plausible reason why Congress might have wanted to adopt the plain meaning of § 365(d)(4). This rationale used by the panel is in conflict with this Court's view of statutory construction. It is not incumbent upon either the litigants or members of the tribunal to establish that there is some "reason" to enforce the plain language of the statute. Rather, it is incumbent

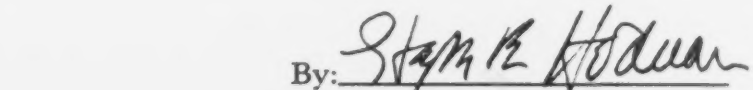
upon those who contend that a statute should not be enforced according to its plain language to show that such enforcement of the statute language would be contrary to clearly expressed legislative intent.

In summary, decisions of the this Court require that an unambiguous statute must be enforced according to its plain language unless, at a minimum, there is a clearly expressed legislative intent to the contrary. There is no clearly expressed legislative intent contrary to the literal language of § 365(d)(4); therefore, the statute should be enforced according to its terms.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court issue a Writ of Certiorari.

Respectfully submitted,

By: 

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DATED: July 22, 1993

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-6056

CHANNEL HOME CENTERS, INC.; CHANNEL HOME CENTERS REALTY CORPORATION; CHANNEL ACQUISITION COMPANY
Debtors

LEGACY, LTD.
Appellant

v.

CHANNEL HOME CENTERS, INC.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 91-04270

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*
BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

Judge HUTCHINSON would grant rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-6056

CHANNEL HOME CENTERS, INC.; CHANNEL HOME CENTERS REALTY CORPORATION; CHANNEL ACQUISITION COMPANY
Debtors

LEGACY, LTD.
Appellant

v.

CHANNEL HOME CENTERS, INC.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 91-04270)

Present: BECKER, HUTCHINSON and ALITO, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel June 26, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 19, 1991, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/
Acting Chief Deputy Clerk

Dated: March 30, 1993

Filed March 30, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-6056

CHANNEL HOME CENTERS, INC.;
CHANNEL HOME CENTERS REALTY
CORPORATION;
CHANNEL ACQUISITION COMPANY
Debtors

LEGACY, LTD.
Appellant

v.

CHANNEL HOME CENTERS, INC.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 91-04270)

Argued: June 26, 1992
Before: BECKER, HUTCHINSON, and ALITO,
Circuit Judges

(Opinion Filed: March 30, 1993)

OPINION OF THE COURT

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ALITO, *Circuit Judge:*

Legacy, Ltd. ("Legacy"), a landlord of Chapter 11 debtor Channel Home Centers Realty Corporation ("Channel Realty"), appeals from an order of the United States District Court for the District of New Jersey. In that order, the district court affirmed two orders of the bankruptcy court that granted, under 11 U.S.C. § 365(d)(4) (1988), a first and second extension of the time within which the lease with Legacy could be assumed. On appeal, Legacy contends that the second extension was invalid because Section 365(d)(4) precludes a bankruptcy court from granting any extension once 60 days have elapsed after the order for relief and because the second extension was granted after that period had ended. Legacy also contends that there was not sufficient "cause" for the

extensions. We affirm the order of the district court.

I.

Channel Home Centers, Inc. ("Channel") is a corporation engaged in the retail sale of home improvement products. Channel Realty is a wholly owned subsidiary of Channel and is engaged in leasing, subleasing, purchasing, and selling real estate interests associated with Channel's retail outlets.

Channel Realty holds a long-term lease from Legacy for property in the Wilmington, Delaware area (the "Brandywine property"). At the time the lease was entered, the property was a vacant lot, but the debtors subsequently constructed a shopping center on the property at a cost of approximately two million dollars. The shopping center includes a Channel retail outlet, and Channel also subleases space to other stores.

On January 14, 1991, Channel and Channel Realty filed separate petitions under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey.[1] Under 11 U.S.C. § 301 (1988), these petitions constituted orders for relief. The two petitions were consolidated, and both debtors continued to operate as debtors in possession. As of the filing date, Channel and Channel Realty were parties to about 200 leases at 91 locations in 19 states.

On February 22, 1991, Channel and Channel Realty moved, pursuant to Section 365(d)(4), for

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1. The remaining appellee, Channel Acquisition Company, which owns all of Channel's stock, filed a chapter 11 petition on April 8, 1991.

an extension of the period of time within which they had to decide whether to assume or reject their leases. In an effort to show that there was "cause" for the extension within the meaning of Section 365(d)(4), Channel and Channel Realty submitted a certification by their chief executive officer, Joseph Nusim, stating that Channel and Channel Realty were "in the process of analyzing their business operations to determine which leases to assume or reject." Explaining that the debtors planned to scale back operations and concentrate on a "'core' geographical area," Nusim continued:

> Although [Channel and Channel Realty's] rehabilitation plan ultimately will require [them] to assume or reject the Leases, [their] flexibility to develop a plan of reorganization would be greatly impaired if [they] were prematurely compelled to make a decision as to the assumption or rejection of the Leases at this time. This is particularly true not only because the Leases constitute a primary asset of [Channel and Channel Realty] necessary for the conduct of Channel's retail business, but also because many of the Leases constitute a valuable real estate asset even if the leased premises are not utilized in Channel's business.
>
> [Channel and Channel Realty] require additional time to determine and fix those locations at which Channel will continue or discontinue the conduct of its retail business as well as to assess the potential value of the Leases as surplus real estate.
>
> . . .

> No landlord will be prejudiced by granting [Channel and Channel Realty] the requested relief because landlords, with few exceptions, continue to receive regular monthly rental payments under the Leases.

App. at 131-132.

Legacy filed an objection to the motion, arguing that Channel and Channel Realty should be forced to accept or reject leases in those areas in which they had decided not to continue operations. Legacy also contended that it would be prejudiced by delay because it would lose the opportunity to take advantage of the market rate for the Brandywine property before any further decline in real estate values.

A hearing on the motion was held on March 15, 1991, but Legacy failed to attend. On that date – 60 days after the Channel and Channel Realty petitions were filed – the bankruptcy judge orally granted an extension until June 17, 1991. A written order to this effect was later entered.

On May 31, 1991 – well before the end of the period of the first extension – the debtors filed a notice of a second motion for an extension under Section 365(d)(4). In the verified application in support of this motion, the debtors noted that they had "expeditiously rejected more than 60 leases since the Filing Date, after making the determination that the leases lacked economic value to the Debtors' estates." Their application further stated:

> Although the Debtors' rehabilitation plan ultimately will require the Debtors to assume or reject all leases, the Debtors' flexibility in developing a plan of reorganization would be

> greatly impaired if the Debtors were prematurely compelled to make a decision as to the assumption or rejection of the Leases at this time.
>
> In particular, assumption of long term leases prior to confirmation of a plan would result in the conversion of unsecured damage claims into substantial administrative expense claims to the detriment of unsecured creditors.

App. at 225-226.

Legacy again filed a written objection. Legacy argued that the plain language of Section 365(d)(4) prohibited any extension once 60 days had passed after the filing of the petition. Legacy also maintained that there was no valid "cause" for the second requested extension because, among other things, the debtors had already determined that the Brandywine lease was for an amount less than its current market value.

At the hearing on the motion, the debtors' vice president of real estate, Tom Ercolano, testified that a real estate consulting firm had been retained to analyze all of the debtors' properties and had assigned five or six people to work on the project for four or five months. By the time of the hearing, he testified, 60 leases had been rejected and a few had been assumed, but the review and analysis of all of the leases had not been completed. Ercolano stated that the Brandywine lease had substantial value, but he explained that the debtors did not want to assume it at that time because they were still in the process of developing their business plan.

At the close of the hearing, the bankruptcy judge stated that he was giving the debtors "one final

extension" until late July, and he added that he was directing that the lease be assumed because it was "certainly a valuable asset" of the estate.

Well before this deadline, the debtors filed a motion for assumption of the Brandywine lease, and Legacy objected. After another hearing, the bankruptcy judge entered an order memorializing the second extension and granting the motion to assume the lease. Legacy took an appeal to the district court from the bankruptcy court's orders granting the debtors' two extension requests.

The district court affirmed and issued a written opinion. The court held that Section 365(d)(4) permits a bankruptcy court to grant a second extension more than 60 days after the order of relief. Noting the debtors' need for time to analyze all of the leases and to decide upon a package of leases to assume, the court also held that there had been valid cause for the extensions.

Legacy then took this appeal.

II.

A. The primary question presented in this appeal concerns a bankruptcy court's authority to grant a second extension under Section 365(d)(4) more than 60 days after the order of relief. Relying heavily on the statutory language, Legacy contends that Section 365(d)(4) prohibits a bankruptcy court from granting any extension once the 60-day period ends. By contrast, the debtors maintain that this provision permits a bankruptcy court to grant a second extension at that time. This position is supported by the district court's decision in this case and all but one of the relevant published decisions. See *In re American Healthcare Management, Inc.*, 900 F.2d 827 (5th

Cir. 1990); *In re Victoria Station, Inc.*, 875 F.2d 1380 (9th Cir. 1989); *In re Advanced Electronics, Inc.*, 108 B.R. 53 (Bankr. M.D. Pa. 1989); *Tigr Restaurant, Inc. v. Rouse S.I. Shopping Center, Inc.*, 79 B.R. 954 (E.D.N.Y. 1987). *Contra In re Coastal Industries, Inc.*, 58 B.R. 48 (Bankr. D.N.J. 1986).

In attempting to answer the question presented in this case, we do not find guidance in many of the sources that are often claimed to shed light on the meaning of statutory language. Although both sides have cited portions of the legislative history, we find nothing in the legislative history that speaks to the question presented here.[2] Nor

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2. Section 365(d)(4) was enacted into law as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333, sec. 362. This provision was contained in a number of bills considered in the Senate. S. 2297, 97th Cong., 2d Sess., sec. 2 (1982); S. 445, 98th Cong., 1st Sess., sec. 252(a) (1983); S. 549, 98th Cong., 1st Sess., sec. 2 (1983). While the legislative history for these bills is extensive, the provision which became 365(d)(4) was given no more than a cursory explanation in the Senate reports and floor debate. *See* S. Rep. No. 70, 98th Cong., 1st Sess. 20-21 (1983) ("Section 365(d) has been amended to provide that . . . an unexpired non-residential lease of the debtor is deemed rejected if the trustee does not assume or reject such lease within 60 days, or within such additional time as the court, for cause, orders."); S. Rep. No. 65, 98th Cong., 1st Sess. 68 (1983) (same); 128 Cong. Rec. S13229 (daily ed. Oct. 1, 1982) (statement of Sen. DeConcini) ("This amendment would require the trustee to decide whether to assume or reject a lease in 60 days . . . . This time could be extended for cause in a complicated case.).

The statement of Senator Hatch, a member of the Senate Judiciary Committee and a Senate Conferee, typified congressional commentary on the provision (emphasis added):

do we see any significant help in the bankruptcy law as it existed before Section 365(d)(4) was

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> The bill would lessen the problems caused by extended vacancies and partial operation of tenant space by requiring that the trustee decide whether to assume or reject nonresidential real property lease within 60 days after the order for relief in a case under any chapter. This time period could be extended by the court for cause, such as in exceptional cases involving large numbers of leases. One of the minor changes in this subtitle was to limit it to nonresidential real property leases. If the lease is not assumed or rejected within this 60- day period, or any additional period granted by the court, the lease is deemed rejected and the trustee must immediately surrender the property to the lessor.

130 Cong. Rec. S8894-95 (daily ed. June 29, 1984), reprinted in 1984 U.S. Code Cong. & Admin. News 590, 599.

Pointing to the phrase "any additional period granted by the court," Legacy contends that Senator Hatch's use of the singular term "period" rather than the plural "periods" indicates that Senator Hatch understood that only one extension could be granted. We disagree. First, the length of time covered by two or more extensions could be referred to as a "period." Second, we refuse to attribute so much significance to a single word uttered by a single member of Congress, even one in a position of particular authority with respect to the legislation in question.

Relying on the same phrase "any additional period granted by the court," the debtors argue that Senator Hatch's use of the word "any" suggests that "the courts have great discretion in granting extensions of time." Appellees' Br. at 28. We find this reliance on a single word no more convincing than Legacy's.

enacted in 1984[3] or in other provisions of the Code.[4]

We do, however, find guidance in the evident purpose of Section 365(d)(4), which, as both parties seem to agree, is to prevent trustees from taking too much time in deciding whether to assume unexpired nonresidential leases. This purpose is apparent from the statute itself, which unequivocally provides that a lease must be deemed rejected unless the trustee assumes it before the 60-day period expires or obtains an extension. Moreover, the legislative history, while silent on the authority of a bankruptcy court to grant a second extension, does support the conclusion that Section 365(d)(4) was intended to prevent undue delay.[5] Likewise, the cases

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3. Before Section 365(d)(4) was enacted in 1984, Chapter 11 debtors had no fixed deadlines for assuming or rejecting unexpired leases, although the court could specify such a deadline. 11 U.S.C. 365(d)(2) (1982). Section 365(d)(4) was clearly intended to impose some restrictions on the time within which a trustee must decide whether to assume or reject a covered lease, but nothing in pre-Code law can tell us what restrictions Congress intended to impose.

4. Legacy observes that Section 365(d)(1), which applies to cases under chapter 7, contains the same relevant language as Section 365(d)(4) and that former Bankruptcy Rule 607, 11 U.S.C. app. (1982), contained similar language. Legacy, however, has not brought to our attention authority establishing that either of these provisions prohibited a second extension after the end of the initial 60-day period. *Cf. In re Telemark Management Co.*, 51 B.R. 623 (Bankr. W.D. Wisc. 1984) (multiple extensions permitted under Section 365(d)(1). Thus, these other provisions do not shed light on the question before us.

5. See the statement of Senator Hatch quoted in footnote 2, *supra*.

construing this provision recognize that this is the provision's purpose. *See In re American Healthcare*, 900 F.2d at 830; *Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077, 1079 (9th Cir. 1989); *In re Moreggia & Sons, Inc.*, 852 F.2d 1179, 1185 (9th Cir. 1988); *Tigr Restaurant*, 79 B.R. at 956; *In re Unit Portions, Inc.*, 53 B.R. 83, 85 (Bankr. E.D.N.Y. 1985)

B. We begin our analysis with the statutory language. Section 365(d)(4) provides in pertinent part as follows (emphasis added):

> . . . [I]f the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or *within such additional time as the court, for cause, within such 60-day period, fixes*, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

In construing this provision, the Ninth Circuit has concluded that the phrase "within such 60-day period" modifies the noun "cause" rather than the verb "fixes." *In re Southwest Aircraft Services, Inc.*, 831 F.2d 848, 851 (9th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988).[6] *See also In re*

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6. Unlike the case before us, *In re Southwest Aircraft* presented the question whether, after the end of the 60- day period, a bankruptcy court could grant an initial extension that had been requested before the period ended. The Ninth Circuit held that the statute permitted the bankruptcy court to grant the extension.

In *In re Victoria Station*, the Ninth Circuit confronted the question presented in this case. Relying on its decision in *In*

Victoria Station, Inc., 875 F.2d at 1383-85. Under this interpretation, the statute would in effect provide that a covered lease would be deemed to be rejected unless the trustee assumed it within the 60-day period or within such additional time as the court fixes for a cause that exists or arises within such 60-day period. Thus, it would seem to follow that even requests for first extensions would not have to be filed or granted during the 60-day period – provided that they were based on a "cause" that existed or arose during that period.[7]

We respectfully disagree with this interpretation for two reasons. First and most important, we believe that it is inconsistent with accepted usage. To use the words "cause . . . within such 60-day period" to mean "a cause that exists or arises within the 60-day period" is unnatural, unclear, and unnecessary. If Section 365(d)(4) were meant to convey this meaning, we are confident that different terms would have been employed.

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re Southwest Aircraft, it held that Section 365(d)(4) does not preclude a second extension that is sought and granted after the 60-day period expired but before a prior extension ended. *In re Victoria Station*, 875 F.2d at 1383-85.

7. While we believe that a necessary consequence of the Ninth Circuit's parsing of the statutory language is that a first extension request would not have to be filed within the 60-day period, the Ninth Circuit's decisions do not expressly embrace this conclusion. As previously noted (footnote 6 *supra*,) *In re Southwest Aircraft* approved a first extension that was requested during the 60-day period but granted after the period expired. *In re Victoria Station* approved a second extension that was sought and granted during the period covered by a first extension.

Second, we are persuaded that this interpretation is not correct because it would not serve the evident purpose of Section 365(d)(4) – to prevent trustees from taking too much time in deciding whether to assume unexpired nonresidential leases. Under this interpretation, as noted, the statute would not impose any restriction on the time for seeking or granting an extension based on a cause that existed or arose during the 60- day period. Thus, the statute would not prohibit a trustee from waiting until long after the 60-day period expired before seeking even an initial extension based on such a cause.[8]

Unable to accept this interpretation of the statute's language, we turn to Legacy's alternative interpretation. Legacy argues that the phrase "within such 60-day period" modifies the verb "fixes." Once this is understood, Legacy contends, the statutory language, read literally, means that a nonresidential lease must be deemed rejected unless the trustee either assumes or rejects the lease (1) within 60 days after the date of the order

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8. In *Tigr Restaurant*, 79 B.R. at 955, the district court offered the following, different interpretation of the statute (emphasis in original):

> Section 365(d)(4) empowers the court to grant extensions of time during "such" 60-day period. "Such" *could* be read as referring only to the "60 days after the date of the order for relief." However, the court is also empowered to grant "such additional time" as it sees fit. In a case where the Court has actually granted "such additional time," "such 60-day period" could refer to sixty-day periods within the "such additional time."

We find this interpretation even more strained than the Ninth Circuit's.

for relief or (2) within any additional period of time that the bankruptcy court fixes *during that 60-day period*. This interpretation would mean that a bankruptcy court would be free during the 60-day period to grant an extension of any length but that the court could not, once the 60-day period ended, grant any further extension for any reason. In practical terms, this interpretation would bar virtually all second extensions.

We agree that a strictly literal parsing of the words of the statute leads to these results, but we do not believe that we are bound to accept such an interpretation in this case. For one thing, we cannot say that the statutory language unambiguously evidences a congressional intent in effect to prohibit second extensions. The statutory language certainly does not prohibit such extensions in so many words; yet it would have been easy for Congress to do so had that been its intent. Thus, the statutory language alone does not rule out the distinct possibility that those responsible for drafting Section 365(d)(4) simply neglected to address the question of second extensions.

Moreover, even unambiguous statutory language need not be followed in those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). *See also, e.g., Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454 (1989); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509- 10 (1989); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). This is one of those rare cases. Indeed, Legacy has not offered and we have

been unable to think of any plausible reason why Congress might have wanted to adopt a provision that means what Legacy says that Section 365(d)(4) means.

If Congress had wanted to eliminate all possible delay beyond the 60-day period, it could have simply prohibited all extensions,[9] but Congress obviously did not go this far. If Congress had wanted to permit some extensions but did not trust the courts to keep those extensions within reasonable bounds, it could have limited the total permitted length of extensions.[10] Legacy, however, does not argue that Congress chose this course, and we agree that the statutory language cannot be read to impose such a limitation.

Legacy maintains that Congress instead chose to combat undue delays by prohibiting bankruptcy courts from granting any second extensions while placing no limit on the length of first extensions. In other words, Legacy argues, Congress wanted to permit a bankruptcy court to grant, say, a single six-month extension but not under any circumstances to grant two three- months extensions or even two one-month extensions. Such a scheme seems a most unlikely one for attempting to prevent undue delay. Indeed, it seems likely to *promote* delay by encouraging bankruptcy courts to err on the side of longer extensions during the 60-day period since no subsequent extensions would be permitted under

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9. An example of such a provision, albeit one promulgated by the Supreme Court rather than enacted by Congress, is Fed. R. Civ. P. 59(e).

10. Familiar examples are Fed. R. App. P. 4(a)(5),(6).

any circumstances. *In re American Healthcare*, 900 F.2d at 830.

Legacy's interpretation would also appear to mean that a bankruptcy court, once the 60-day period ended, could not *shorten* any extension granted before that period expired. So long as the trustee assumed the lease within the period allowed by the extension granted during the 60-day period, (*i.e.*, "within such additional time as the court . . . , within such 60-day period, fixe[d]"), the assumption of the lease would appear to be valid. We do not believe that Congress meant to adopt such a strange regime.

Instead, we believe that the language of Section 365(d)(4) was framed and adopted without considering the question of second extensions. We believe that Congress meant to require that initial extensions be sought before the 60-day period expired but that Congress did not address and therefore did not mean to prohibit subsequent extensions that are requested and granted before the expiration of a prior extension.[11] See *In re Victoria Station*, 875 F.2d at 1385 ("Section 365(d)(4) . . . simply does not speak to the ability of a debtor to move for a second extension of time subsequent to the first 60-day period but within the extended period of time provided for assumption or rejection.") We thus agree with the result reached by the two other courts of appeals

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11. Because both the extensions in this case were requested and granted before the relevant period expired, we need not and do not decide whether under Section 365(d)(4) a timely request may be granted after the period expires. See *In re American Healthcare*, 900 F.2d at 830 n.2 (citing conflicting cases).

and all but one of the other courts that have considered this question. Accordingly, we hold that Section 365(d)(4) did not bar the bankruptcy court from granting a second extension in this case.

III.

Legacy argues that even if Section 365(d)(4) does not prohibit second extensions after the end of the 60-day period there was no good "cause" for the extensions granted in this case. We disagree.

Legacy first contends that the bankruptcy and district courts committed legal error by holding that an extension may be granted because of the time needed by a Chapter 11 debtor to develop a plan of reorganization. Legacy reasons as follows. The Code grants a Chapter 11 debtor the exclusive right to develop a reorganization plan during the first 120 days after the filing of the petition unless that period is shortened or lengthened by the court. 11 U.S.C. § 1121(b),(d) (1988). Section 365(d)(4), by contrast, requires a trustee to assume or reject a lease within 60 days unless an extension is granted. Therefore, Legacy reasons, an extension may not be granted because of a debtor's need for more than 60 days to complete its plan. As Legacy puts it, "[t]he very purpose of § 365(d)(4) was to make debtors decide about assumption or rejection of a lease prior to filing their plan of reorganization." Appellant's Br. at 33.

In our view, the final step in this process of reasoning is unsound. Since the time period specified in Section 365(d)(4) (absent an extension) is 60 days and the time period specified in Section 1121 (absent modification by the court) is 120 days, it follows that an extension under Section 365(d)(4) may not properly be granted for the sole

purpose of making these two periods coincide and without considering whether the extension is in fact needed in the particular case in question. *In re Perfectlike Co.*, 116 B.R. 84, 88 (Bankr. N.D. Ohio 1990). But nothing prevents a bankruptcy court from granting an extension because a particular debtor needs additional time to determine whether the assumption or rejection of particular leases is called for by the plan of reorganization that it is attempting to develop. Thus we agree with the district court in this case and with *In re Wedtech Corp.*, 72 B.R. 464, 471-72 (Bankr. S.D.N.Y. 1987), that it is permissible for a bankruptcy court to consider a particular debtor's need for more time in order to analyze leases in light of the plan it is formulating.

Finally, Legacy argues that the bankruptcy court made erroneous factual findings regarding the debtors' need for more time. We have reviewed the pertinent portions of the record, and we find no clear error. We find sufficient factual support for the finding that the debtors needed the extensions in order to make a decision regarding the Brandywine lease as part of their plan.

The order of the district court is therefore affirmed.

HUTCHINSON, J., *Dissenting.*

I respectfully dissent from the Court's order and opinion in this case. I do so because I believe § 365(d)(4) of the Bankruptcy Code unambiguously authorizes the bankruptcy court to grant only a single extension of time for a debtor to decide whether to assume or reject an unexpired lease of nonresidential real property. Even if the statute did permit multiple extensions, I do not believe

that cause to justify the bankruptcy court's order granting the debtor a second extension of time is present here. Therefore, I would vacate the order of the district court and remand the case to it with instructions to reverse the order of the bankruptcy court granting the debtors a second extension.

A central issue in this case is whether § 365(d)(4) is ambiguous. *See Mellon Bank v. Aetna Business Credit*, Inc., 619 F.2d 1001, 1011 (3d Cir. 1980) (term is ambiguous if susceptible to two reasonable alternative interpretations). We have applied the following principles in determining ambiguity:

> [I]f the statutory language is clear and plain, a court must give it effect unless the legislative history is such that a literal reading "will produce a result demonstrably at odds with the intention of [the] drafters," [*Griffin v. Oceanic Contractors, Inc.*,] 458 U.S. [564,] 571 [(1982)], or in other words, "would thwart the obvious purposes of the . . . [statute]." *Mansell v. Mansell*, [490 U.S. 581, 592] (1989) . . . .

Smith v. Fidelity Consumer Discount Co., 898 F.2d 907, 910 (3d Cir. 1990) (parallel citations omitted)

Section 365(d)(4) states in pertinent part:

> [I]f the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, *or within such additional time as the court, for cause, within such sixty-day period, fixes*, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C.A. § 365(d)(4) (West 1993) (emphasis added). As the Court seems to recognize, the plain meaning of the emphasized language limits the bankruptcy court to granting a single extension of time within the initial sixty-day period during which a debtor would otherwise have to decide whether to assume or reject an unexpired lease of commercial real estate.

In re Coastal Industries, Inc., 58 B.R. 48 (Bankr. D.N.J. 1986) aptly makes this point. The debtor there, like the debtors in the present case, had filed a second motion to extend. The second motion was filed before the expiration of the time allowed by the first extension, but after the expiration of the initial sixty-day period. The bankruptcy court denied the debtor's second motion because the "language in fixing the time within which the debtor must act is unequivocal" and the court "would truly be gazing with a jaundiced eye were it to perceive some ambiguity within § 365(d)(4)." *Id.* at 50.

This Court now states, to avoid the effect of the text, "[I]f Congress had wanted to eliminate all possible delay beyond the 60-day period, it could have simply prohibited all extensions[.]" *Supra* typescript at 14-15. There was no need, however, for Congress to restate the principle that a bankruptcy court may grant only one extension under § 365(d)(4). It had already said so. Additional statement would have been redundant.

As the Court also recognizes, the legislative history of § 365(d)(4) contains no indication that the statute does not mean what its plain text says. Section 365(d)(4) was enacted in 1984 as part of the Bankruptcy Amendments and Federal

Judgeship Act, Pub. L. 98-353, 98 Stat. 333, sec. 362. Before its enactment, Chapter 11 debtors had no fixed deadlines for assuming or rejecting unexpired leases. Thus, as the Court puts it, "Section 365(d)(4) was clearly intended to impose some restrictions on the time within which a trustee must decide whether to assume or reject a covered lease[.]" *Supra* typescript at 9 n.3. It is acknowledged that this restrictive purpose appears not only in the unequivocal language of the statute itself, but also in its legislative history. *See supra* typescript at 10. Thus, the Court quotes comments by Senator Hatch as some indication of general congressional sentiment regarding § 365(d)(4). I repeat them here:

> The bill would lessen the problems caused by extended vacancies and partial operation of tenant space by requiring that the trustee decide whether to assume or reject nonresidential real property lease within 60 days after the order for relief in a case under any chapter. This time period could be extended by the court for cause, such as in exceptional cases involving large numbers of leases. One of the minor changes in this subtitle was to limit it to nonresidential real property leases. If the lease is not assumed or rejected within this 60-day period, or any additional period granted by the court, the lease is deemed rejected and the trustee must immediately surrender the property to the lessor.

Supra typescript at 8-9 n.2 (quoting 130 Cong. Rec. S8894-95 (daily ed. June 29, 1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 590, 599) (emphasis deleted).

I also think the Court's interpretation of § 365(d)(4), to give a debtor an opportunity for multiple extensions of time, hinders accomplishment of the main purpose of the statute. Multiple opportunities for extension allow a debtor to speculate on the market for commercial real estate during the prolonged period of uncertainty about the tenant's election to accept or reject the leasehold. The landlord has no such opportunity. It must simply wait and suffer the uncertainty of the market risk that the debtor avoids while delaying decision. So long as unilateral power to accept or reject a lease remains in the debtor, mutuality of obligation is absent. I think Congress, in enacting § 365(d)(4), wanted to put limits on that unilateral power and to do so said, in effect, to debtors who are lessees of commercial real estate—at the time you seek the protection of a bankruptcy court, decide within sixty days whether you want to continue your commercial leases with both their obligations and their benefits or else persuade the court within that sixty days that you need more time.

I realize that there is some force in the Court's observation that a prolonged lack of mutuality is possible even under my interpretation of § 365(d)(4) because that section does not limit the length of the first extension. *See supra* typescript at 15. Despite that observation's initial appeal, I do not think it overcomes the statute's unambiguous text. Moreover, the statute's limiting purpose is still served, at least in part, by allowing only one extension. If that single extension must be granted within sixty days of a petition for reorganization, the landlord knows soon after bankruptcy precisely when his uncertainty will end

and the debtor also knows when he must act to affirm or reject. This shared knowledge assists both parties in planning their affairs and it limits the possibility that one party, the tenant, can continue to free itself of market risk as it continues to monitor market conditions at the other party's expense.

The Court reasons that interpreting § 365(d)(4) as permitting only one extension within the initial sixty-day period "would also appear to mean that a bankruptcy court, once the sixty-day period ended, could not *shorten* any extension granted before that period expired." *See supra* typescript at 15 (emphasis in original). The language of the statute, however, unequivocally addresses only the time within which a bankruptcy court may *fix* additional time for the debtor to act to accept or reject the lease. It does not prohibit the bankruptcy court from shortening an extension properly granted within the first sixty- day period. The reason for the absence of such a prohibition is logically tied to the statute's legislative purpose of preventing undue delay by the debtor in accepting or rejecting a lease. If the circumstances that warranted the extension change, thus rendering the additional time unnecessary, the language of § 365(d)(4) does not prevent the bankruptcy court from entering an order shortening the extension of time that it granted for the debtor to act.

Thus, the Court's interpretation of § 365(d)(4), permitting the bankruptcy court to grant multiple extensions of time after the expiration of the initial sixty-day period, seems to me inconsistent with the statute's plain meaning and purpose. It is also unsupported in the legislative history. Accordingly,

I do not think it is likely to be right. *See Government of the Virgin Islands v. Knight*, Nos. 92-7013 & 92-7052, typescript at 28 (3d Cir. Mar. 15, 1993) (construction inconsistent with statute's plain meaning is justifiable only when clear indications of contrary legislative intent exist) (citing *Consumer Party v. Davis*, 778 F.2d 140, 147 (3d Cir. 1985)).

If we read § 365(d)(4) naturally, to permit only one extension of the sixty-day period in which to assume or reject a lease, we are faithful to both the plain language of the text and its purpose. While absence of mutuality of obligation between the debtor and the lessor would still exist initially, uncertainty is reduced. By the same token, a stand-still agreement compelled by law remains in place to meet the debtor's need for time to sort out its obligations; that stand-still agreement is subject to reasonable extension if extension is needed and promptly sought.

Moreover, even if the statute did permit multiple extensions, it still would require cause for all extensions. Here, I do not think there is cause for granting the second extension. I appreciate the complexity of the debtors' reorganization, involving, as it does, more than two hundred leases. That complexity justified the first extension; however, by the time the debtors moved for the second extension, they had already determined that the Brandywine lease had "substantial value" because the rent required was less than the fair value of the lease term. If the debtors ultimately decide to file a reorganization plan that does not include continued operations on the Brandywine premises, they can sublet at a profit. They cannot lose. The bankruptcy court recognized this when it directed

the debtors to assume the lease because it was "certainly a valuable asset." Accordingly, these debtors have not met the statutory requirement of showing cause for the second extension.

In sum, both the language and legislative history of § 365(d)(4) indicate that a bankruptcy court may grant only a single extension of time within which a debtor must determine whether to accept or reject an unexpired nonresidential lease and that extension must be granted within the initial sixty-day period. Furthermore, even if multiple extensions were permissible, these debtors have no cause which could justify the second extension the bankruptcy court granted them. I would therefore reverse the district court's order affirming the bankruptcy court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LEGACY, LTD., *Plaintiff,* v. CHANNEL HOME CENTERS, INC., CHANNEL HOME REALTY, CORPORATION, and CHANNEL ACQUISITION COMPANY *Defendants.*	C. A. NO. 91-4270 (AJL) ORDER

This matter having come before the court by way of appeal of the bankruptcy court's interlocutory orders, filed 2 April 1991 and amended 11 April 1991 (the "11 April Order") and the final order, filed 30 July 1991 (the "Final Order") brought by plaintiff Legacy Ltd. pursuant to 28 U.S.C. §158(a), and the court having considered the submissions of the parties, and for the reasons set forth in a Letter-Opinion filed on this date, and for good cause shown,

IT IS, on this 11th day of December, 1991,

ORDERED, that the 11 April Order is affirmed; and it is further

ORDERED, that the Final Order is affirmed.

/s/ Alfred J. Lechner, Jr.
Alfred J. Lechner, Jr.,
U.S.D.J.

NOT FOR PUBLICATION

LETTER-OPINION
ORIGINAL FILED WITH THE CLERK OF THE COURT

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Re: *Legacy, Ltd. v. Channel Home Centers, Inc., Channel Home Centers Realty Corporation and Channel Acquisition Company*
Civil Action No. 91-4270

Counsel:

Currently before the court is the appeal brought by appellant Legacy, Ltd. ("Legacy") of the interlocutory order of the Honorable William F. Tuohey, United States Bankruptcy Judge (the "Bankruptcy Judge"), filed 2 April 1991 and amended 11 April 1991 (the "11 April Order") and the final order, filed 30 July 1991 (the "Final Order") (collectively, the "Orders"), in the bankruptcy proceedings

of appellees Channel Home Centers, Inc. ("Channel"), Channel Home Centers Realty Corporation ("Channel Realty") and Channel Acquisition Company ("Channel Acquisition") (collectively, the "Debtors"). Legacy appeals the Orders which extend the time in which the Debtors could assume or reject nonresidential real estate leases pursuant to 11 U.S.C. § 365(d)(4).[1] Jurisdiction is alleged pursuant to 28 U.S.C. § 158(a) and Bankruptcy Rule 8001(a).

For the reasons set forth below the Orders are affirmed.

Facts[2]

Channel is a Delaware corporation engaged in the retail sale of do-it-yourself home improvement products. Appendix, Certification of Joseph Nusim ("Nusim Certif.") at 2. *Id.* Channel also owns or leases parcels of real estate for its retail outlets or warehouses. Channel Realty is a Delaware corporation engaged in leasing, subleasing, purchasing and selling real estate interests associated with Channel's retail outlets. *Id.* Channel Realty is a wholly owned subsidiary of Channel. *Id.* Channel Acquisition is a Delaware corporation and owns one hundred percent of Channel's stock. Appendix, Thomas Graham Certification in Support of Joint Motion for an Order Pursuant to § 365

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1. The following has been submitted in this appeal: Appellant Legacy, Ltd.'s Opening Brief on Appeal from the United States Bankruptcy Court for the District of New Jersey ("Legacy Brief"); Brief of Appellees, Channel Home Centers, Inc., Channel Home Centers Realty Corporation and Channel Acquisition Company (the "Opp. Brief"); Appellant Legacy, Ltd.'s Reply Brief on Appeal from the United States Bankruptcy Court for the District of New Jersey (the "Reply Brief") and Appellees' Appendix (the "Appendix").

The Appendix contains twenty documents pertaining to this appeal. Because the documents are not separately indexed, but rather, numbered consecutively, references will be as follows: Appendix, document name at ____ page of appendix.

2. The facts are taken from documents in the Appendix. In particular, the procedural history is taken from the 21 June Hearing and the 25 July Hearing which thoroughly recount the procedural history of the First and Second Motion to Extend.

of the Bankruptcy Code Approving the Assumption of NonResidential Real Property Lease and Subleases ("Graham Certif.") at 188.

Channel Realty is the lessee and Legacy is the lessor of property in Brandywine, Delaware (the "Brandywine Property") pursuant to a lease, dated 17 March 1966 (the "Brandywine Lease").[3] *Id.* at 191. The current term of the Brandywine Lease calls for its expiration in the year 2010 with a one time option to extend for 20 years. Appendix, Transcript of Proceedings, dated 21 June 1991, 136, 172 (the "21 June Hearing"). At the time the Debtors entered into the Brandywine Lease, the Brandywine Property consisted of a vacant lot. Appendix, Graham Certif. at 188. The Debtors constructed a 61,565 square foot shopping center at a cost of approximately two million dollars. *Id.* Since completion of the shopping center, Channel has been operating a retail outlet which occupies approximately 53,000 square feet. *Id.* Channel subleases (the "Subleases") the remaining 8,565 square feet to Sassy Snippers, ("Snippers"), a beauty salon, Red Snapper ("Red Snapper"), a restaurant and Video Frequency, Inc. ("Video"), a video store. *Id.* at 191-192.

On 14 January 1991 (the "Filing Date") Channel and Channel Realty filed separate petitions for relief (the "Petitions") under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "Code"). *Id.*, Nusim Certif. at 2, Graham Certif. at 188. Since that date, Channel and Channel Realty have continued to operate their businesses and properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Code. *Id.*, Nusim Certif. at 2. On 17 January 1991 the above chapter 11 bankruptcy proceedings were consolidated pursuant to Bankruptcy Rule 1017. *Id.* at 3.

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3. The lease was originally between Magness Construction Co., the lessee, and Cedar Inn, Inc., the lessor. Appendix, Graham Certif. at 191. Legacy and Channel Realty became the lessor and lessee, respectively, through various assignments and amendments. *Id.*

As of the Filing Date, Channel and Channel Realty were parties to approximately two hundred leases (the "Leases") at ninety-one locations in nineteen states. *Id.*, 21 June Hearing at 161, Graham Certif. at 189. As part of the Leases, Channel leased or owned approximately eighty-six retail stores and a corporate headquarters in New Jersey. *Id.*, Graham Certif. at 189. Since the Filing Date, Channel and Channel Realty have sought to consolidate their business operations into fifty-two of their most profitable locations. *Id.*

On 22 February 1991 Channel and Channel Realty moved for an extension of the period of time in which they have to assume or reject the Leases pursuant to section 365(d)(4) of the Code (the "First Motion to Extend"). *Id.*, Transcript of Proceeding, held 25 July 1991 (the "25 July Hearing") at 249. In support of the First Motion to Extend, Channel and Channel Realty submitted the Certification of Joseph Nusim ("Nusim"), the president and chief executive officer of Channel and Channel Realty. Nusim stated Channel and Channel Realty were "in the process of analyzing their business operations to determine which Leases to assume or reject." *Id.*, Nusim Certif. at 4. Nusim explained, the "prospective rehabilitation plan is designed to scale back Channel's retail operations in order to focus on a 'core' geographical area involving 52 of its most profitable retail outlets." *Id.*

Nusim continued:

> Although [Channel's and Channel Realty's] rehabilitation plan ultimately will require [them] to assume or reject the Leases, [their] flexibility to develop a plan of reorganization would be greatly impaired if [they] were prematurely compelled to make a decision as to the assumption or rejection of the Leases at this time. This is particularly true not only because the Leases constitute a primary asset of [Channel and Channel Realty] necessary for the conduct of Channel's retail business, but also because many of the Leases constitute a

> valuable real estate asset even if the leased premises are not utilized in Channel's business.
>
> [Channel and Channel Realty] require additional time to determine and fix those locations at which Channel will continue or discontinue the conduct of its retail business as well as to assess the potential value of the Leases as surplus real estate.
>
> . . .
>
> No landlord will be prejudiced by granting [Channel and Channel Realty] the requested relief because landlords, with few exceptions, continue to receive regular monthly rental payments under the Leases.

Id. at 4-5. Nusim stated that these facts taken together constitute "cause" for purposes of section 365(d). *Id.*

Legacy filed an objection to the First Motion to Extend on the ground that cause did not exist for the extension. Legacy argued Channel and Channel Realty should be required to assume or reject properties not in the geographic location in which they have decided to continue to operate. *Id.*, Objection of Legacy to First Motion to Extend at 7. Legacy further argued it would be prejudiced if an extension is granted because it would lose the opportunity to take advantage of market rates before a further decline in real estate values. *Id.* at 8.

On 15 March 1991, a hearing was held before the Bankruptcy Judge on the First Motion to Extend. *Id.* at 10. Despite Legacy's filed objections, it did not attend the hearing. *Id.*, 15 March Hearing at 11-12. On 15 March 1991 the Bankruptcy Judge orally granted the First Motion to Extend and extended the time within which to assume or reject the Leases to 17 June 1991. *Id.* 21 June Hearing at 150. The 11 April Order memorialized the verbal extension of time. *Id.*, 25 July Hearing at 250. No appeals were filed of the 11 April Order granting the First Motion to Extend. *Id.*, at 251.

On 8 April 1991 Channel Acquisition filed a petition for relief under Chapter 11 of the Code in this action. *Id.*, Graham Certif. at 188-189. Channel Acquisition has continued its operations as a debtor-in-possession. *Id.* at 189.

On 31 May 1991 the Debtors filed a second motion for an omnibus order pursuant to section 365 of the Code extending Debtors' time to assume or reject unexpired nonresidential real property leases (the "Second Motion to Extend"). *Id.*, 25 July Hearing at 251. The Debtor's verified pleadings for the Second Motion to Extend stated:

[S]ince the filing of their petitions, Channel and Channel Realty have been involved in an ongoing process of analyzing the value of the Debtors' real estate and nonresidential real property leases, partly in conjunction with the RDS Group, their former real estate management consultant, seeking to determine whether certain leases should be rejected or whether certain leases should be assumed . . . to maximize the assets of their respective debtor estates while minimizing their respective liabilities.

Id., Verified Application of Debtors-in-Possession in Support of Second Motion to Extend (the "Verified Application") at 75-76. The Verified Application further stated that since the Filing Date, the Debtors have rejected more than sixty leases after determining their lack of financial value. *Id.* at 77.

The Debtors explained that cause existed for the extension because:

> Although the Debtors' rehabilitation plan ultimately will require the Debtors to assume or reject all leases, the Debtors' flexibility in developing a plan of reorganization would be greatly impaired if the Debtors were prematurely compelled to make a decision as to the assumption or rejection of the Leases at this time.
>
> In particular, assumption of long term leases prior to confirmation of a plan would result in the conversion

> of unsecured damage claims into substantial administrative expense claims to the detriment of unsecured creditors.

Id. at 78.

The Second Motion to Extend was returnable on 17 June 1991. *Id.* at 73. On 10 June 1991 Legacy filed its objection to the Second Motion to Extend. *Id.* Legacy argued the plain language of section 365(d)(4) prohibits a second extension because it was filed more than sixty days after the Filing Date. *Id.*, Objection to Second Extension at 82. Legacy further argued, even if section 365(d)(4) permits a second extension, the second extension must be based on the same cause as that upon which the first extension was based. *Id.* at 86-87. Lastly, Legacy argued no cause existed for the Second Motion to Extend because the Debtors had already determined the Brandywine Lease was under market value. *Id.* at 88.

On 17 June 1991 a hearing was held on the Second Motion to Extend. Due to the congestion of the bankruptcy court's calendar, the Bankruptcy Judge verbally granted an extension until 21 June 1991. *Id.*, Transcript of Proceedings, dated 15 June 1991 at 133. Legacy objected to this extension. *Id.* at 133, 21 June Hearing at 151.

On 21 June 1991 Judge Tuohey reconvened the hearing on the Second Motion to Extend. The Brandywine Lease was the sole lease at issue at the 21 June Hearing. *Id.* at 150. Legacy argued that section 365(d)(4) permits the court to make extensions for cause, but such extensions must be made within the original sixty days from the Filing Date. *Id.* at 153. Legacy also reiterated that the cause asserted by the Debtors supporting the Second Motion to Extend is a new cause which cannot be the basis for a second extension. *Id.* at 155.

At the 21 June Hearing the Debtors called Tom Ercolano ("Ercolano"), vice president of real estate, to testify. Ercolano stated that after the Filing Date, Channel retained the RDS Group, a real estate consultant firm, to analyze the Debtors' entire real estate assets and to determine how to handle their properties. *Id.* at 161. The

RDS Group assigned five or six people to work on the project, which lasted for four or five months until the employment relationship was terminated. *Id.* at 161-162. Ercolano testified even though sixty leases had been rejected and less than ten leases assumed,[4] as of the 21 June Hearing, the review and analysis of the Leases was not completed. *Id.* at 162.

With respect to the Brandywine Lease, Ercolano testified Channel collects approximately $96,000 annually in rent on the Subleases. *Id.* at 171. Channel pays Legacy $20,000 plus consumer price index increases annually on the Brandywine Lease. *Id.* Ercolano stated Channel invested around two million dollars to develop the Brandywine Property which has a current market value of four million dollars. *Id.* at 171-172. Ercolano stated the Brandywine Lease has substantial value. *Id.* at 172. He explained, however, Channel did not want to assume the Brandywine Lease on 21 June 1991, but rather sought the second extension because the Debtors "have not made a decision to assume *any* leases . . ." while they were still in the process of developing their business plan which would further define their core stores. *Id.* at 173 (emphasis added). Ercolano testified the Debtors "have decided [they] would not reject [the Brandywine Lease]." *Id.* Ercolano appears to indicate the Debtors wanted additional time until they were more sure of the success of the reorganization plan.[5] *Id.* at 175.

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4. The leases assumed as of the 21 June Hearing involved assigned leases. Appendix, 21 June Hearing at 162.

5. At the 21 June Hearing, the following was stated:

The Court: Why don't you want to assume?

> Mr. Martin: We have never made any bones about the fact that our argument is we just don't want — you know — in the event there is a failure, we don't wanted [sic] —
>
> The Court: In the event there is a failure, this is one of the best assets in the case for the unsecured creditors probably. I don't know where we're going here.

Appendix, 21 June Hearing at 175.

At the close of the testimony, the Bankruptcy Judge directed the Debtors to assume the Brandywine Lease within thirty days. *Id.* at 176-77. The Bankruptcy Judge stated the Brandywine Lease is a very valuable asset and he would not allow the Debtors to reject it. *Id.* at 176. 26 July 1991 was set as the date by which the Debtors had to assume the Brandywine Lease. *Id.* at 178 (citing *In re Garrett Road*, 95 B.R. 902 (E.D.Pa. 1989); *In re Southwest Aircraft Serv., Inc.*, 831 F.2d 848 (9th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988)). Legacy preserved its objection to the Second Motion to Extend. *Id.* at 179.

On 21 June 1991 the Debtors filed a Notice of Contingent Assumption of Ground Lease for the Brandywine Lease. *Id.* at 182. On 1 July 1991 Legacy filed an appeal from the oral 21 June 1991 order of the bankruptcy court granting the Second Motion to Extend.[6] *Id.*, Notice of Appeal at 184. On 3 July 1991 the Debtors filed a motion for assumption of the Brandywine Lease (the "Motion to Assume"). *Id.*, 25 July Hearing at 255.

In support of the Motion to Assume, the Debtors submitted the certification of Thomas Graham ("Graham"), assistant secretary for reorganization matters for the Debtors. Graham stated the Debtors

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6. At the 25 July Hearing the Bankruptcy Judge deemed Legacy's appeal of the Second Motion to Extend a nullity. Appendix, 25 July Hearing at 256-57. The Bankruptcy Judge explained, the verbal thirty-day extension given on 21 June 1991 was

> an interlocutory order insofar as it extended the assumption period, and . . . was entered within the statutory framework of [section 365 of the Code] in that it was still within the original 60 day period as previously extended by orders of this Court, and that there was no gap wherein the Debtor allowed the extension period to terminate without this Court having for cause extended same.

Id. Because an appeal cannot be entered prior to the entry of a judgment by the clerk of the bankruptcy court, *id.* at 257 (citing Fed. R. Civ. P. 58), and neither the transcript of the 21 June Hearing nor the order had been docketed prior to the 25 July Hearing, the Bankruptcy Judge held the appeal could not be entered. *Id.*

> [i]n their best business judgment, seek approval of their assumption of the Brandywine Lease due to its value to the Debtors. The operating profit of the Brandywine store is approximately $600,000 per year which represents 10.3% of sales for 1990 (the "Sales Percentage"). The Brandywine Store's Sales Percentage is significantly above that of the other retail outlets operated by the Debtors.
>
> . . .
>
> [T]he approximate annual rent that Channel Realty pays to [Legacy] with respect to the Brandywine Lease is $39,506. . . . Channel Realty receives approximately $104,765 per year in rent from Snippers, Snapper and Video. Therefore, the Debtors net approximately $65,259 per year with respect to the Brandywine Lease and Subleases, making the Channel Store better than "rent free."
>
> . . .
>
> The Debtors have analyzed the Brandywine Lease and determined that this rental price is substantially below market rent. The Debtors have also analyzed the Brandywine Subleases and have determined that these rental amounts are at or slightly below market rent.

Id., Graham Certif. at 192-93.

Graham also indicated Channel Realty is in default of the Brandywine Lease for its failure to pay the following prepetition rental amounts:

$13,950.83	Consumer Price Index Adjustment for 1990 which became due in March 1991.
$ 167.74	Pre-petition rent for 1 January 1991 through 13 January 1991.
$ 17.56	Pre-petition sewer taxes for 1 January 1991 through 13 January 1991.

Id., at 194. Graham stated the Debtors would cure the above default upon approval of assumption of the Brandywine Lease. *Id.*

Legacy filed an objection to the Motion to Assume. *Id.* at 196. The Motion to Assume was returnable on 22 July 1991; this date was extended to 25 July 1991 in order to conduct a full hearing. *Id.*, 25 July Hearing at 255-56.

At the 25 July Hearing the Bankruptcy Judge stated with respect to the Brandywine Lease:

> It is undisputed . . . that the Lease is in the interest of the Debtor and creditors of this estate. The lease with Legacy is far less than the rents that flow to the Debtor from the three sub tenants . . . . This lease, rather than being a cash drain on the Debtor, gives the Debtor a direct positive cash flow on an annualized basis of in excess of $65,000.
>
> In addition, it gives the Debtor a rent free operation in a shopping mall of its own facility.

Id. at 264. The bankruptcy court articulated the test to determine if assumption is warranted under section 365(d)(4) "is whether the assumption of the lease is within the best business judgment . . . of the Debtor-in-Possession." *Id.*

Finding the Debtors met the best business judgment test, the bankruptcy court considered whether the time-period during which the Debtors could assume the Brandywine Lease had been interrupted. Accordingly, the Bankruptcy Judge had to consider the meaning of section 365(d)(14). *Id.* As to the issue of multiple extensions, the bankruptcy court held:

> Congress did not intend to restrict and hamstring the debtors and the bankruptcy courts. A fair reading of Section 365(d)(4) convinces me that Congress wanted to hold the debtors' feet to the fire, and force them to move expeditiously on leases, and it is clear that bankruptcy courts may

> not cavalierly extend the original 60 day lease assumption period, and that said extentions [sic] must only be for cause, but as has been noted in the two circuit court cases that ruled on this matter, . . . the pressure is to force the debtor to move for any extensions within the extended or original time frame.

Id. at 265-66.

Applying this standard to the Debtors, the Bankruptcy Judge found that Channel "filed [its] motion for an extension clearly substantially before the expiration of the previous extension period." *Id.* at 266. In making its ruling, the bankruptcy court explicitly rejected the holding of *In re Coastal Indus., Inc.*, 58 B.R. 48 (Bankr. D.N.J. 1986). *Id.* at 265-66. At the close of the 25 July Hearing, the bankruptcy court entered the Final Order memorializing the 21 June bench order extending the assumption period and granting the Motion to Assume the Brandywine Lease. *Id.* at 268. The Final Order was filed on 30 July 1991.

Discussion

The issues raised on appeal can be summarized as follows; first, whether the bankruptcy court is authorized under section 365(d)(4) of the Code to grant multiple extensions after the expiration of the initial sixty day period but prior to the expiration of the extended period; second, whether cause existed to grant the First Motion to Extend to 17 June 1991 and the Second Motion to Extend to 25 July 1991; third, if the Motions to Extend were not permissible on any ground, whether the Debtors justifiably relied on the bankruptcy court's decision.

A. *Multiple Extensions pursuant to Section 365(d)(4)*

The interpretation of section 365(d)(4) is a question of law which requires *de novo* review on appeal. *In re Victoria Station, Inc.*, 875 F.2d 1380, 1382 (9th Cir. 1989); *Southwest*, 831 F.2d at 849. "A court's objective in interpreting a federal statute is to ascertain the intent of Congress and to give effect to its legislative will." *Id.*

(citing *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)). In determining the legislative intent of Congress the court should first look to the language of statute. *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *Southwest*, 831 F.2d at 849 (citing *United States v. James*, 478 U.S. 597 (1986); *Blum v. Stenson*, 465 U.S. 886, 896 (1984)).

If the plain meaning of a statute is evident from the face of the statute, " 'the sole function of the courts is to enforce it according to its terms.' " *Ron Pair Enter.*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *see also In re Continental Airlines, Inc.*, 932 F.2d 282 (3d Cir. 1991). If the language is ambiguous, the court should consider the legislative history of the statute. *See e.g., Victoria Station*, 875 F.2d at 1383.

"The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *Ron Pair Enter.*, 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *see also Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907, 910 (3d Cir. 1989). In those rare cases, "the intention of the drafters, rather than the strict language, controls." *Ron Pair Enter.*, 489 U.S. at 242.

Section 365(d)(4) of the Code provides:

> Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or *within such additional time as the court, for cause, within such 60-day period, fixes*, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(d)(4) (emphasis added). The critical language in this appeal is the meaning of "within such additional time as the court, for cause, within such 60-day period, fixes."

In *Coastal*, the court held: "The mandate of [section] 365(d)(4) is unequivocal in that it demands either assumption, rejection, or a fixing of additional time within that sixty-day time frame." 58 B.R. at 49; *see also In re House of Deals, Inc.*, 67 B.R. 23, 25 (Bankr.E.D.N.Y. 1986). This interpretation of section 365(d)(4) has been an anomaly in case law. The majority of courts have found the language of section 365(d)(4) is ambiguous and subject to various interpretations. *See e.g., In re American Healthcare Management, Inc.*, 900 F.2d 827, 929 (5th Cir. 1990); *Victoria Station*, 875 F.2d at 1384-85; *Southwest*, 831 F.2d at 850-54; *In re Advanced Elecs., Inc.*, 108 B.R. 53, 54-55 (Bankr.M.D.Pa. 1989).

The *Southwest* court articulated the various interpretations of section 364(d)(4) as follows:

> It is not entirely clear whether the second term — "within such 60-day period" — modifies the term that precedes it or the term that follows it. If we read it as modifying "fixes", then a bankruptcy court would not under the literal words of the statute have the authority to grant a timely motion to extend after the sixtieth day. . . . If, however, the 60-day term modifies "for cause," then while the cause must arise within 60 days . . . there is no express limit on when the bankruptcy court must hear and decide the motion.

831 F.2d at 850; *accord Victoria Station*, 875 F.2d at 1383. The *Southwest* court has articulated the ambiguities of section 365(d)(4) well; the language of the statute does not, without a doubt, have only one interpretation. Even accepting the contention that section 365(d)(4) has a plain meaning that extensions can be granted only within the original sixty-day time period, for the reasons set forth

below, such meaning is contrary to the legislative intent of the statute.

In *Southwest*, the court looked to the legislative history as an aid to determine the appropriate interpretation of section 365(d)(4). 831 F.2d at 850-51. Although legislative history on this section is sparse, the *Southwest* court held the legislative history favored application of the more expansive interpretation of section 365(d)(4). *Id.* at 851. The legislative history indicates that prior to 1984, debtors-in-possession had no fixed deadline to assume or reject an unexpired non-residential lease. 11 U.S.C. § 365(d) (1983); *see also Southwest*, 831 F.2d at 850. As a result, debtors-in-possession were allowed to retain control over real estate they were not necessarily using, or not using to full capacity. Real estate vacancies were problematic with shopping center properties because vacancies in shopping center space impacted the vitality and success of the other businesses in the shopping center. Senate Report, (29 June 1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 576, 598-99.

Because Congress was concerned about the tendency of bankrupt tenants to wait until bankruptcy courts forced debtors to decide whether to assume or reject a lease, Congress amended section 365 in 1984 (the 1984 Amendments). *Id.* at 598-99. The 1984 Amendments added subsection (d)(4) which imposed the sixty-day time limitation on the assumption or rejection of a lease and the ability to extend this period "for cause."

The legislative history provides:

> The bill would lessen the problems caused by extended vacancies and partial operation of tenant space by requiring that the trustee decide whether to assume or reject nonresidential real property lease [sic] within 60 days after the order for relief in a case under any chapter. *This time period could be extended by the court for cause, such as in exceptional cases involving large numbers of leases.*

Id. at 599 (emphasis added). Noting the absence of a reference "to any requirement that the bankruptcy judge make his finding within any particular period of time," the *Southwest* court stated Congress' emphasis was on "cause for an extension." 831 F.2d at 851. The court reasoned: "Congress was concerned that a properly supported motion for extension, i.e., one for good cause, should be permitted under the provision and not that the bankruptcy court should be stripped of its authority to grant an extension if it did not act within a prescribed time period." *Id.*

The *Southwest* court described the effects of strict interpretation on the debtor as follows:

> [A] diligent debtor with an unexpired lease . . . who moved for an extension of time immediately upon filing his petition for relief would nevertheless automatically lose the lease if the bankruptcy court failed, for whatever reason, to decide the motion within a 60-day period. Also, a debtor who diligently attempted to determine whether he could prudently assume the lease, and sought an extension only after he had determined that more time was in actuality required, might find his leasehold interest forfeited if the bankruptcy judge took even a minimal amount of time to conduct a hearing and reach a decision. The results in both instances would be manifestly unjust . . . .

Id. at 852. Rather than forfeit a debtor's rights because of a bankruptcy court's inability or failure to act within a specified time, the *Southwest* court adopted the liberal and more flexible interpretation of section 365(d)(4). *Id.* at 851-52.

Moreover, the court pointed out that Congress could not have intended to impose time strictures on the bankruptcy court's decision making process. *Id.*; *see also Garrett*, 95 B.R. at 903 n.2. The restraint imposed on the bankruptcy court was to prohibit retroactive extensions.

Tigr Restaurant Inc. v. Rouse S.I. Shopping Center, Inc., 79 B.R. 954, 956 (E.D.N.Y. 1987); *In re The Casual Male Corp.*, 120 B.R. 256, 263 (Bankr.D.Mass. 1990); *In re Southern Motel Assocs., Ltd.*, 81 B.R. 112, 118 (Bankr.M.D.Fla. 1987).

The court explained literal enforcement of section 365(d)(4) would encourage "*pro forma* motions for extension of time before [the debtor] had a full opportunity to consider whether an extension was necessary . . . simply to minimize the possibility that the vagaries of bankruptcy court scheduling would deny them a timely hearing." *Southwest*, 831 F.2d at 852. The *Southwest* court concluded a literal interpretation of the language would circumvent the purpose of the statute while an expansive interpretation "strikes the balance between creditor protection and debtor relief that Congress intended, and is eminently reasonable, fair and sensible." *Id.* at 853.

With the exception of the Coastal court, the *Southwest* interpretation has been followed. *See e.g., Victoria Station*, 875 F.2d at 1383-85; *Garrett*, 95 B.R. at 903; *Chapman Inv. Assocs. v. American Healthcare Management, Inc.*, 94 B.R. 420, 422 (N.D.Tex. 1989), *aff'd* 900 F.2d 827 (5th Cir. 1990); *Tigr Restaurant*, 79 B.R. at 956-58; *In re Car-Gill, Inc.*, 125 B.R. 133, 136 (Bankr.E.D.Pa. 1991); *The Casual Male*, 120 B.R. at 263; *In re Perfectlite Co.*, 116 B.R. 84, 86 (Bankr.N.D.Ohio 1990); *Advanced Elec., Inc.* 108 B.R. at 55; *In re Wedtech Corp.*, 72 B.R. 464, 468-71 (Bankr.S.D.N.Y. 1987).

Literal interpretation of section 365(d)(4) may also result in debtors moving for longer extensions than necessary in the event they later need more time to make a decision. Such a result would also thwart the purpose of section 365(d)(4) because it would cause unnecessary delay and thus burden the landlords — the very reason for enacting subsection (d)(4). The *American Healthcare* court articulated the virtue of several short extensions over one long extension.

> [I]f bankruptcy courts may grant multiple extensions they will be more likely to extend the time in which to assume or reject for discrete periods. To obtain additional extensions, lessees would have to return to court and again demonstrate cause justifying the extensions. This approach gives bankruptcy courts greater control over bankrupt lessees' actions and allows the courts to more closely monitor lessees' activities to ensure that they resolve the status of their leases in a diligent manner.

900 F.2d at 830.

Importantly, the "for cause" requirement indicates Congress foresaw circumstances which could give rise to a debtor's need for more than sixty days to determinate whether to assume or reject a lease. *Chapman Inv.*, 94 B.R. at 422. As indicated by the *Chapman* court, "cause" would be likely to arise in an instance where the debtor had several leases around the country which needed to be examined prior to the debtor's decision. *Id.* In this case, the Debtors had around two hundred leases at ninety-one different locations. Therefore, it is specifically the situation contemplated where a debtor may need to move for an extension.

Moreover, the 1984 Amendments include a safeguard for the lessors in the event an extension is granted. Subsection (d)(3) gives the debtor a sixty-day grace period from the filing of the order for relief to pay its monthly rent, but after the expiration of the sixty days, the debtor must resume rent payments. "This section, taken in connection with (d)(4), assures lessors that regardless of how long the debtor takes to assume or reject the lease, rent payments will be made on the lease." *Id.*, 94 B.R. at 422.

Lastly, in this case, "a rigid construction [of 365(d)(4)] would be contrary to justice [and] the general purposes of the Bankruptcy Code as a whole . . . ." *Tigr Restaurant*, 79 B.R. at 956. In *Tigr Restaurant*, the landlord made repeated attempts to terminate Tigr's lease. The *Tigr*

Restaurant court stated this "suggests that [the landlord] is trying to use Tigr's bankruptcy petition as an opportunity to secure a windfall to itself at the expense of Tigr and Tigr's creditors." *Id.* The court held to rigidly construe section 365(d)(4) would frustrate the principle that the Code is not intended to provide windfalls to debtor's lessors. *Id.*, at 957; *see also Garrett*, 95 B.R. at 903 n.2.

In this case, a literal construction of section 365(d)(4) would similarly allow Legacy to receive a windfall because the Brandywine Lease is far below market value. Moreover, such an application would be detrimental to the Debtors' other creditors because the Brandywine Property is a revenue-generating lease. Significantly, "Chapter 11 of the Bankruptcy Code is designed primarily to permit continuation of the debtor's business and rehabilitation of the debtor." *Tigr Restaurant*. 79 B.R. at 957. To strictly construe section 365(d)(4) and thus preclude the issue of cause, would hinder the policies of the Code and the goals of reorganization and rehabilitation.

In light of the absence of legislative history to the contrary and the fact that a literal application of section 365(d)(4) would impose time constraints on bankruptcy court's decision-making process, impose an injustice on the Debtors, and frustrate the general policies of the Code, the Debtors' interpretation of section 365(d)(4) is the more reasonable one. Any other interpretation would "produce a result demonstrably at odds with the intentions of [Congress]." *Ron Pair Enter.*, 489 U.S. at 242. Accordingly, the bankruptcy court was authorized to grant the Second Motion to Extend.

B. *Cause pursuant to Section 365(d)(4)*

Legacy argues even if section 365(d)(4) authorizes both the First Motion to Extend and the Second Motion to Extend, the Debtors failed to show cause for either motion. With respect to the Second Motion to Extend, Legacy argues the cause must be the same as the cause giving rise to the First Motion to Extend. Legacy argues the cause offered to support the Second Motion to Extend was different. Even if the cause was the same, Legacy

argued it did not constitute cause because the Debtors knew they would not reject the Brandywine Lease at the time of each motion.

Neither Section 365(d)(4) nor legislative history provide a definition of cause. The *Wedtech* court enumerated several factors to consider to determinate whether cause existed for extending the period during which to reject or assume a lease.[7]

The following factors weigh in favor of granting an extension:

> (i) the lease is a *primary asset* and the "decision to assume or reject the lease would be *central to any plan of reorganization*" in the Chapter 11 proceeding; (ii) the landlord has a reversionary interest in a building built by the tenant on the landlord's land and the *gaining* of the building *would represent a windfall to the landlord*, (iii) the debtor has not had the *time necessary* to intelligently " '*appraise its financial situation* and the *potential value of its assets* in terms of the

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7. Legacy argues the issue of cause is one of law, not fact. Reply Brief at 16. Legacy argues there is a difference "between a legal determination of what grounds constitute 'cause,' and the factual determinations of whether those grounds have been proven." *Id.* By means of example, Legacy offers the difference between a determination of a whether a lack of good faith is grounds for dismissal under §1112(b) of the Code, a matter of law, and a finding of whether there is a lack of good faith, a question of fact. *Id.* Whether "cause" is a basis to grant an extension of time is not in dispute. The dispute involves the Bankruptcy Judge's finding of cause on the support provided by the Debtors. Because a finding of whether there is an issue of fact, it is subject to the clearly erroneous standard of review. Bankruptcy Rule 8013 provides:

> On appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order or decree or remand with instructions for further proceedings. *Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous* . . . .

Bankruptcy Rule 8013.

> formulation of a plan . . . .' "; and (iv) the existence of any other facts indicating the lack of a "reasonable time to decide whether to assume or reject."

72 B.R. at 471-72 (citations omitted) (emphasis added).

The *Wedtech* court further stated the factors counselling against granting an extension are:

> (i) failure to pay for the use of property in the cases of commercial leases, *failure to pay the rent* reserved in the lease; (ii) *damage to the lessor* "beyond the compensation available under the Bankruptcy Code" through the debtor's continued occupation of the land and its failure to pay taxes; and (iii) where the *debtor fails* or is unable to *formulate a plan* when it has had more than enough time to do so.

Id. at 472 (citations and footnotes omitted) (emphasis added). An additional factor implied by the legislative history is whether neighboring tenants are affected by an extended vacancy in the property. *In re Victoria Station, Inc.*, 88 B.R. 231, 236 n. 7 (9th Cir. 1988); *Perfectlite Co.*, 116 B.R. at 86 (citing *Wedtech*, 72 B.R. at 471-72).[8]

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8. Preliminarily, it is noted the only explicit reference to the *Wedtech* factors appears to be in the 21 June Hearing when the Debtors state it intends to show:

> the lease is a primary asset of the Debtor; the case is complex and involves a large number of leases; the lessor continues to receive monthly rental payments; the lease is well below market value and a substantial value to the estate; that the landlord would reap a windfall by the Debtor's failure to assume or reject within the time period.

Appendix, 21 June Hearing at 153. However, neither the parties nor the bankruptcy court went through a step-by-step factual analysis of these factors. Accordingly, this matter could have been vacated and remanded to the bankruptcy court for more thorough factual development.

Although this matter will proceed for review, in the future, the bankruptcy court should require the debtor to provide a detailed

1. *Nature of Cause*

In this case, the bankruptcy court appropriately found cause with respect to the First and Second Motion to Extend. As a preliminary matter, Legacy argues the reason offered for the First Motion to Extend — to allow "additional time to determine to fix those locations at which Channel will continue or will discontinue the conduct of its retail business as well as to assess the potential value of the leases as surplus real estate" — is not the same cause asserted for the Second Motion to Extend. Legacy Brief, 23 (quoting Appendix, Nusim Certif. at 5.) Legacy states by the time of the 21 June Hearing, Channel knew it was not going to reject the Brandywine Lease. Reply Brief, 13.

Legacy, however, overlooks other reasons asserted by Channel and Channel Realty to support their request for the First Motion to Extend. Specifically, Nusim states the "flexibility to develop a plan of reorganization would be greatly impaired if they were prematurely compelled to make a decision as to the assumption or rejection of the Leases at this time." Appendix, Nusim Certif. at 4. The Debtors offered this same reason in support of the Second Motion to Extend. *Id.* Verified Application at 78, 21 June Hearing at 173. Although the Debtors were aware of the value of the Brandywine Lease at the time of the Second Motion to Extend, such knowledge does not eliminate their concerns to have flexibility in developing a plan for reorganization.

Moreover, all the supporting statements, with the exception of Ercolano's testimony, given in support of both motions were made in reference to all of the Leases.

NOTES *(Continued)*

showing of cause and should, at the least, make detailed findings of fact concerning cause which track the *Wedtech* factors and any other relevant decisions. Without such an analysis and detailed opinion at the bankruptcy court level, the district court, on appeal, must serve the function of the bankruptcy court.

In this case, although the bankruptcy court has not provided detailed findings and rationale, the basis of its determination of cause can with effort be determined from the record.

Although the supporting statements do not go into great detail, they do, at least, address the same cause. Because the cause asserted for each motion is the same, it is in appropriate to determine whether multiple extensions can only be granted because the original cause is ongoing.

2. *Existence of Cause*

In this case, consideration of the Wedtech factors indicates that cause existed for both the First Motion to Extend and the Second Motion to Extend.

a. *Primary Asset*

The Debtors classified the Leases in general as a "primary asset of [Channel and Channel Realty] necessary for the conduct of Channel's retail business, but also because many of the Leases constitute a valuable real estate asset even if the leased premises are not utilized . . . ." Appendix, Nusim Certif. at 4-5; *see also id.* Verified Application at 76.

Legacy has not opposed this classification, nor does there appear to be a basis to oppose it. Channel operates retail sale home-improvement stores. Therefore, it is necessary for Channel to have leases for property on which to operate its stores. Unlike the situation in *In re Muir Training Technologies, Inc.*, 120 B.R. 154, 159 (Bankr.S.D.Cal. 1990), the Brandywine Lease has particular value to a reorganization plan because it is substantially below the market rate for similar rental places. In *Muir Training* the debtors lease was at the going rate and there was an abundance of available leases in ideal locations. *Id.* at 159.

In this case, not only would the Debtors have difficulty replacing the Brandywine Lease, it is a profit generating center for the Debtors. If the Brandywine Lease is rejected, Channel and Channel Realty will lose a substantial amount of income from which they could pay their creditors. *See e.g., In re S & M Food Servs., Inc.*, 117 B.R. 497, 498 (Bankr.E.D.Mo. 1990). Accordingly, at the time of the First and Second Motions to Extend, the Brandywine Lease was a primary asset of the Debtors; the bankruptcy

court's determination of cause is not clearly erroneous to the extent it was based on this factor.

b. *Lessor's Opportunity for Windfall*

It appears Legacy has a reversionary interest in the building on the Brandywine Property, even though Channel built it. One of the major thrusts of Legacy's argument is that an extension of time to assume or reject the Brandywine Lease will prejudice Legacy because the real estate market is declining and they will have to lease the property at a lower rate if they lose the opportunity to lease it at the end of the sixty-day period. Appendix at 9, 88. Implicit in Legacy's argument is its anticipation of a windfall if the Brandywine Lease is rejected. *Id.* at 9, 21 June Hearing at 153.

Although the Bankruptcy Court does not make a reference to the windfall bestowed on Legacy in the event the Debtors do not assume or reject the Brandywine Lease within the time period, such consideration would only support his finding of cause. The Code is not intended for lessors to receive a windfall to the detriment of the debtor and other creditors; accordingly, the bankruptcy court's finding of cause to extend at the time of both the First Motion to Extend and the Second Motion to Extend is not clearly erroneous.

c. *Debtor's Time to Analyze Situation*

The third *Wedtech* factor is whether the debtor has "had the time necessary to intelligently 'appraise its financial situation and the potential value of its assets in terms of the formulation of a plan.' " 72 B.R. at 471. In support of both the First and Second Motion to Extend, the Debtors state that they need flexibility and time to analyze their business operations and a plan of reorganization. Appendix, Nusim Certif. at 4, Verified Application at 78, 21 June Hearing at 162, 173.

With respect to the First Motion to Extend, Legacy argues Channel and Channel Realty had already "identified the 52 most-profitable retail outlets." Reply Brief, 13, n.3 (citing Nusim Certif.). In addition, Legacy argues Channel and Channel Realty admitted that they had

already determined that the Brandywine Lease was undervalued. *Id.* (citing Nusim Certif.).

Legacy, however, misconstrues Nusim's statements. Nusim states:

> The Debtors' prospective rehabilitation plan is designed to scale back Channel's retail operations in order to focus on a "core" geographical area involving 52 of its most profitable retail outlets.
>
> . . .
>
> The Debtors require additional time *to determine and fix those locations* . . . .

Appendix, Nusim Certif. at 4 (emphasis added). Accordingly, Legacy's statement that it already knew Channel and Channel Realty had determined the geographic location is without basis and does not defeat the Bankruptcy Judge's finding of cause for the First Motion to Extend.

Nor is it clear from the record that Channel and Channel Realty had determined the value of the Brandywine Lease at the time of the First Motion to Extend. Nusim states that forcing an immediate decision with respect to the Leases would impair their plan of reorganization "because many of the Leases constitute a valuable real estate asset even if the leased premises are not utilized in Channel's business." *Id.* This statement was made with respect to the Leases in general and does not make a specific reference to the Brandywine Lease.

Although Channel and Channel Realty, to support the First Motion to Extend, should have more thoroughly detailed which Leases they knew were valuable retail assets, or the grounds for such a belief, Nusim's general statement about the Leases cannot be read to, necessarily, include the Brandywine Lease. Accordingly, Legacy's interpretation cannot defeat the Bankruptcy Judge's finding of cause for the First Motion to Extend.

Significantly, it appears that Channel and Channel Realty's initial focus was on eliminating leases for property at which Channel no longer had retail stores and deciding

where to hold going-out-of-business sales.[9] Given their focus on which leases to definitely reject, it is not unreasonable for Channel and Channel Realty to have only a general impression that some of the Leases are valuable assets. Therefore, their request for additional time to better analyze the remaining Leases appears justified. Accordingly, the Bankruptcy Judge's finding of cause is not clearly erroneous.

Legacy seeks to buttress its argument with Ercolano's statement that the Debtors knew they were not going to reject the Brandywine Lease. Reply Brief at 13 n.2. Ercolano's statement, however, was made at the 21 June Hearing in conjunction with the Second Motion to Extend. Importantly, Ercolano does not make a reference to when the Debtors decided they would not reject the Brandywine Lease.

With respect to the Second Motion to Extend, Legacy argues the Debtors knew they were going to assume the Brandywine Lease and therefore, would not need additional time. Reply Brief, 14-15. The Debtors' request for time, however, was not specific to the Brandywine Lease, but rather dealt with over one hundred unexpired leases which had not been rejected or assumed at the time of the Second Motion to Extend.[10]

Significantly, Ercolano testified about the steps taken to analyze the Leases. Channel and Channel Realty hired a real estate consulting group which had five or six employees for three to five months analyze the Leases. Appendix, 21 June Hearing at 161. Ercolano stated even

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9. Nusim stated:

> In pursuit of this business plan, the Debtors recently rejected 34 leases of non-residential real property at which Channel was no longer operating its retail business. Additionally, it has obtained Court approval to conduct going-out-of-business sales at an additional 33 retail locations.

Appendix, Nusim Certif. at 4.

10. Ercolano testified sixty of the Leases had been rejected and less than ten had been assumed of the 200 Leases at the time of the 21 June Hearing. Appendix, 21 June Hearing at 162.

after the termination of the real estate consulting group, the analysis was not completed and the Debtors continued the project. *Id.* at 162. Ercolano further stated, the Debtors' request for additional time was based on the fact that they wanted to assume the Leases as a package, after they had formed a plan of reorganization, to diminish the risk of losses in the event of an unsuccessful reorganization. *Id.* at 172-174.

With respect to this factor, the court apparently agreed with Legacy's argument that if the Debtors knew they were going to assume the Brandywine Lease, they did not need an extension beyond the time necessary to file a motion to assume. The bankruptcy court did not, however, reject the Debtors desire to have more time so that they could finalize their plan of reorganization. The Bankruptcy Judge specifically distinguished the Brandywine Lease as a special situation because it would be a valuable asset regardless of the success of the reorganization. He stated:

> [I]f I force you to assume this . . . I wouldn't view this as a precedent to whether you are going to assume a lease in . . . some other little town where you've got a ten or a fifteen year retail commercial lease. Those are different cans of worms, okay? And there, because of the complexity of the case, maybe you are entitled to some slack.

Appendix, 21 June Hearing at 174.

d. *Debtors' Payment of Rent and Damages to Legacy*[11]

With respect to the Debtors' payment of rent under the Brandywine Lease, the Debtors have continued to make regular post-petition monthly payments of administrative rent, with the exception of rent for the period from

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11. It does not appear from the record that the bankruptcy court considered this factor in any implicit manner. Nevertheless, because whether the Debtors have maintained their rent obligations to Legacy can be ascertained from the record, this factor is now considered.

1 January 1991 through 13 January 1991 in the amount of $167.74. Appendix, Verified Application at 77, Graham Certif. at 194. The Debtors, however, have not paid Legacy the consumer price index rent adjustment for 1990 under the Brandywine Lease which became due in March of 1991 in the amount of $13,950.18. *Id.* at 194. The Debtors are also in default for pre-petition sewer taxes from 1 January 1991 to 13 January 1991 in the de minimis amount of $17.56.

Because the Debtors have paid all post-petition rent payments, with the exception of the consumer price index adjustment for 1990, Legacy would not be injured, nor does it contend it is, by the grant of the First Motion to Extend or the Second Motion to Extend. The amount of pre-petition rent the Debtors own Legacy is minimal and would not injure Legacy. The fact that the Debtors are in arrears in the amount of $17.56 for pre-petition sewer taxes, similarly, would not injure Legacy so as to defeat the Bankruptcy Judge's finding of cause.

The only damage Legacy asserts it incurred as a result of the extensions is their ability to take advantage of the market value of the Brandywine Property prior to a decline in the real estate market. *Id.*, 8, 88. As previously mentioned, the Code is not designed to assure creditors receive a windfall as the cost of the Debtors. *Tigr Restaurant*, 79 B.R. at 957. Accordingly, Legacy's assertion cannot defeat the finding of cause with respect to the First or Second Motion to Extend.

Lastly, Legacy will not be injured because of a decline in the business of the Debtors' neighboring tenants. Such injury was a specific concern of Congress. 1984 U.S. Code Cong. & Admin. News at 599. In this case, Channel's neighboring tenants are subtenants of Channel, not tenants of Legacy. Accordingly, Legacy will not be injured if the subtenants are impacted by Channel's reorganization. Although the bankruptcy court did not consider this factor, consideration of it would not alter its finding of cause.

e. *Debtors' Efforts to Reorganize*

Although the bankruptcy court did not require the Debtors to detail their progression of the plan of reorganization, it was cognizant of the Debtors' efforts to develop a plan. Indeed, the primary reason the Debtors requested additional time to assume or reject the Brandywine Lease and any other Leases was to allow them time to formulate their business plan. Appendix, Nusim Certif. at 2, 21 June Hearing at 173. In fact, the Bankruptcy Judge recognized the Debtors' concern with respect to assuming leases prior to formulating a plan of reorganization because of the complexity of case and excessive costs the Debtors could incur in the event of failure. At the time of the First Motion to Extend the plan of reorganization was clearly just in its beginning stages because the Debtors had not yet determined the geographical locations for its fifty-two core stores. Appendix, Nusim Certif. at 4. Nusim's statements indicated, however, that Channel and Channel Realty were in the process of formulating a plan.

At the time of the Second Motion to Extend, the Debtors statements also revealed that they were diligently seeking to formulate a plan. The Debtors had rejected over sixty of the Leases and assumed around ten of the Leases, determined some of the geographic locations of the fifty-two core stores and appeared to be continuing its efforts. Accordingly, cause cannot be defeated because of a lack of diligent efforts on the part of the Debtors with respect to the plan of reorganization.

In light of the fact that the Brandywine Lease appears to be a primary asset, Legacy would receive a windfall if the Brandywine Lease were rejected, the Debtors' maintenance of their post-petition monthly rent payments, the lack of damage to Legacy and the Debtors' diligent efforts in formulating a plan of reorganization, the bankruptcy court's finding of cause for the First Motion to Extend and

the Second Motion to Extend is not clearly erroneous. Accordingly, the 11 April Order and the Final Order are affirmed.[12]

Conclusion

For the reasons set forth above, section 356(d)(4) authorizes the bankruptcy court to grant multiple extensions and the bankruptcy court properly found cause for each extension. Accordingly, the Orders are affirmed. An order accompanies this opinion.

/s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR.,
U.S.D.J.

AJL:jb
cc: Ellen Smith, Deputy Clerk

12. Because the bankruptcy court was authorized to grant multiple extensions and properly found cause for the First Motion to Extend and the Second Motion to Extend, it is not necessary to determine whether the Debtors justifiably relied on the bankruptcy court's decisions.

/s/ Michelle Rosen Silverman

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In the Matter of: CHANNEL HOME CENTERS, INC., CHANNEL HOME CENTERS REALTY CORPORATION and CHANNEL ACQUISITION COMPANY, *Debtors-in-Possession.*	In Proceedings for Reorganization under Chapter 11 of the Bankruptcy Code Hon. William F. Tuohey Case No. 91-20161 Consolidating Bankruptcy Nos. 91-20161, 91-20162, 91-22234 ORDER PURSUANT TO §365 OF THE BANKRUPTCY CODE APPROVING THE ASSUMPTION OF NON-RESIDENTIAL REAL PROPERTY LEASE AND SUBLEASES (Store No. 991-0, Brandywine, Delaware) Hearing Date: July 25, 1991 2:00 p.m.

This matter having been presented to the Court on the Debtors' application for an order approving the assumption of a certain lease for non-residential real property located at 2510 Foulk Road, Brandywine, Delaware (the "Brandywine Premises") more particularly described as the lease for Store No. 991-0 (the "Brandywine Lease") as well as for an order approving the Debtors' assumption of its subleases at the Brandywine Premises with the subtenants Sassy Snippers, Video Frequency and Red Snapper (the "Subleases"); and the Court having considered the

objections filed in opposition thereto by Legacy, Ltd., the landlord of the Brandywine Lease, the arguments of counsel and the testimony presented by way of Verified Application of Debtors-in-Possession in Support of Second Omnibus Motion for an Order Pursuant to 11 U.S.C. §365 Extending Time to Assume or Reject Unexpired Leases of Non-Residential Real Property verified by Thomas Graham, dated May 30, 1991, and the Certification of Thomas Graham dated July 3, 1991 respectively filed in support of the motion to extend the time to assume or reject the Brandywine Lease as well as in support of the assumption of the Brandywine Lease, and the oral testimony of Thomas Ercolano, Vice President of Real Estate of Channel at a hearing conducted on June 21, 1991, as well as the oral arguments of counsel presented at the hearings conducted on June 17, June 21, July 22 and July 25; and the Court having issued oral Opinions and Decisions from the Bench on each of the respective return dates which are incorporated by reference herein;

IT IS on this 30th day of July, 1991,

ORDERED as follows:

1. The hearing held on June 21, 1991 with respect to the Debtors' application to extend the Debtors' time to assume or reject the Brandywine Lease as an unexpired lease of non-residential real property be and the same is reopened and augmented by the record before the Court on Thursday, July 25, 1991;

2. The time for the Debtors to assume or reject the Brandywine Lease be and the same is hereby extended through Friday, July 26, 1991;

3. The Debtors have demonstrated adequate assurance of performance to Legacy, Ltd. entitling the Debtors to assume the Brandywine Lease and Subleases;

4. The Debtors be and the same are hereby authorized to assume the Brandywine lease as well as the Subleases more particularly described in Exhibits A and B hereto as of June 17, 1991 and that these assumptions be and the same are hereby approved;

5. The Debtors shall cure all existing defaults under the Brandywine lease by paying the sum of $14,136.13 to the landlord, Legacy, Ltd. within ten days from July 25, 1991.

6. The Notice of Appeal filed by Legacy, Ltd. with respect to the ruling and decision of the Court at the hearing conducted on June 21, 1991 be and the same is hereby dismissed as a nullity.

/s/ William F. Tuohey

William F. Tuohey, U.S.B.J.

TRANSCRIPT

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY
CASE NO. 91-20161 (WFT)

In the Matter of:	)	
	)	PROCEEDINGS
CHANNEL HOME CENTERS,	)	
	)	
Debtor.	)	

DATE:	July 25, 1991, at 2:00 p.m.
BEFORE:	HONORABLE WILLIAM F. TUOHEY, United States Bankruptcy Judge.
LOCATION:	UNITED STATES BANKRUPTCY COURT, Federal Square, Newark, New Jersey.
PURSUANT TO:	MOTION APPROVING ASSUMPTION OF NON-RESIDENTIAL PROPERTY BY DEBTOR AND OTHER RELIEF.

[34] The Court: Turning to the issue of the right of the Debtor to assume the Legacy lease.

It is undisputed, as I have found earlier in this opinion entered today, that the lease is in the interest of the Debtor and creditors of this estate. The lease with Legacy is far less than the rents that flow to the Debtor from the three sub tenants that I have referred to. This lease, rather than being a cash drain on the Debtor, gives the Debtor a direct positive cash flow on an annualized basis of in excess of $65,000.

In addition, it gives the Debtor a rent free operation in a shopping mall of its own facility.

Now, what is the test under Bankruptcy Code Section 365; it is whether the assumption of the lease is within the

best business judgment test of the Debtor-in-Possession. Clearly, that test is met by the record herein and the record consists of Mr. Ercolano's testimony at the June 21st hearing, as well as the Thomas Graham affidavit filed July 3rd; the facts therein not being in dispute.

Now, on the issue as to whether or not there is a break in the chain of the period in which the Debtor has the right to assume this lease.

The only case relied upon by Legacy is In Re [35] Coastal Industries Incorporated, 58 Bankruptcy Reporter page 48, a 1986 opinion of Judge DeVito.

With all due respect to my friend and former colleague, Judge DeVito, I must strenuously disagree with that opinion; it is simply, in my opinion, not good law. Congress did not intend to restrict and hamstring the debtors and the bankruptcy courts. A fair reading of Section 365(d)(4) convinces me that Congress wanted to hold the debtors' feet to the fire, and force them to move expeditiously on leases, and it is clear that bankruptcy courts may not cavalierly extend the original 60 day lease assumption period, and that said extensions must only be for cause, but as has been noted in the two circuit court cases that ruled on this matter, and those cases are referred to as In Re American Health Care Management Incorporated reported at 900 Bankruptcy Reporter page 827, that's a Fifth Circuit case of 1990; as well as In Re Victoria Station Incorporated reported at 875 Federal Reporter Second page 1380, a Ninth Circuit 1989; both of those circuit cases in the Fifth Circuit and the Ninth Circuit, recognize that the pressure is to force the debtor to move for any extensions within the extended or [36] original time frame.

Thus, the Debtor must move for any extension beyond the original statutory 60 day period by filing a motion within that period for any extension.

A review of the record in this case discloses that the Debtor, Channel, has met those requirements; each time the Debtor has filed a motion for an extension clearly substantially before the expiration of the previous extension period.

So I find that the tests of American Health and Victoria Station have been met.

I particularly note that Jude DeVito, in Coastal Industries, relying on Southwest Aircraft Services, a case from California in 1985, it was reported at 53 Bankruptcy Reporter 805, and that that case was later reversed, that California case on which Judge DeVito relied for his strict ruling, or his narrow ruling, was reversed and Southwest Aircraft was reversed by the Ninth Circuit. That is reported in 831 Federal Reporter Second at page 848; certificate was denied; that went all the way to the United States Supreme Court and a Ninth Circuit reversal of the lower court was [37] affirmed — rather certiori was denied 487 U.S. 1206, 1988.

It is noted by the Court that when, pressed in oral argument this afternoon, Legacy's counsel was unable to cite one case, other than Judge DeVito's Coastal case, within the over ten year history of the Bankruptcy Code that came to the same conclusion that the Coastal case did.

So for all of those reasons, I am rejecting the argument in Coastal and I am finding that there has been no interruption in the assumption period and the Debtor has met its burden in that regard.

I've also found that under 365 the Debtor is acting in its interests in assuming this lease.

Now, there is one final issue under 365; this Court must take into consideration the rights of the landlord. More particularly, Section 365(b)(1)(C) requires that I make a determination that the assumption not only will result in the curing of all of the arrears under the lease, but that I find that the Debtor has provided adequate assurance of future performance to the landlord under the assumed lease.

There is nothing before me on that issue that would dispute the ability of Channel to make the [38] continuing payments to Legacy and, in this regard, though I do note that the cash flow from the three underlying subleases in and of themselves without any income stream from Channel itself supports the payments under the Legacy lease,

and the fact that I can use that fact as a determination of adequate assurance was commented upon in In Re Lafayette Radio Electronics Corporation reported at 7 Bankruptcy Reporter page 189, that's a bankruptcy decision from the Eastern District of New York reported in 1980, it was one of the lynchpin cases in this area. So I do make an expressed finding that the landlord's interest will be protected and there is every reason to conclude that the Debtor has provided us with adequate assurance of future performance.

So for all of the aforesaid reasons, I am voiding the Notice of Appeal. I will enter an order, nunc pro tunc, that memorializes the bench order entered June 21st, extending the assumption period, and I am today granting the Debtors' motion and allowing the assumption of the Legacy lease in Brandywine, Delaware.

Now, the Debtor is to tender within ten days of today all lease payments from pre-bankruptcy [39] that have not been paid, all pass throughs, adjustments, taxes, et cetera, are to be paid. All of that is to be paid by the Debtor within ten days of today. Within ten days of today.

Now, should there be a default in that, the landlord is, obviously, free to move on short notice of three days to the Debtor for immediate termination. But the Debtor is to cure all those arrears, bring the lease current as to all payments within ten days.

All right. That concludes it.

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